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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1407

RODMAN & RENSHAW,

Petitioner,

vs.

ROBERT AND SANDRA SCHAEFER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT.

Petitioner, Rodman & Renshaw, prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered on January 30, 1975.

OPINIONS BELOW.

The decision and orders of the District Court for the Northern District of Illinois, resulting in dismissal of the action against Rodman & Renshaw, are unreported and appear in Appendix A, pps. A13-A18. An earlier opinion of the District Court on various motions is reported at 326 F. Supp. 1186 (N. D. Ill. 1970), here Appendix A, pps. A1-A12. The opinion of the Court of Appeals is reported at 509 F. 2d 1287 (here, Appendix A, pps. A19-A40).

JURISDICTION.

The judgment of the Court of Appeals was entered on January 30, 1975. A timely petition for rehearing and suggestion of *en banc* rehearing were denied by a "majority" of the active judges on April 4, 1975 (Appendix A, p. A41). Jurisdiction is conferred in this Court by 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether a cause of action for damages for manipulation of prices of shares of stock listed on a national exchange for which a specific damage remedy is available under § 9 of the Securities Exchange Act of 1934 may also be implied under §10(b) of that Act and Rule 10(b)(5) of the Securities Commission where the action would be time barred by the limitations period of § 9(e) of the Act?

2. Whether any private right of action for damages may be implied under § 17 of the Securities Act of 1933 and whether, if such a right is implied, a privity requirement exists as a predicate to its maintenance?

3. Whether, if the limitations period of the forum state is to be applied, the period should be tolled as to defendant whose liability is derivative and vicarious and is not predicated upon complicity in the fraudulent scheme but upon negligence facilitating the fraud?

4. Whether, if either of such actions may be implied, the limitations periods of the Securities Acts should be applied and not the limitations period of the forum state?

STATUTES INVOLVED.

The pertinent sections of the Securities Act of 1933 and Securities Exchange Act of 1934 are Sections 13 and 17 of the 1933 Act (15 U. S. C. A. § 77m and § 77q) and Sections 9, 10(b) of the 1934 Act (15 U. S. C. A. § 78i and § 78j(b).

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They are set forth in Appendix B, pages A42-A45. Rule 10(b)5 of the Securities Exchange Commission is set forth in Appendix B, p. A46).

STATEMENT OF THE CASE.

Rodman & Renshaw ("Rodman"), a stock brokerage firm, was named a defendant in the case because of the alleged participation of its one-time employee, Nagorsky, in a conspiracy to manipulate and raise the price of shares of Hercules Galion Products, Inc. ("Hercules") on the American Stock Exchange. The case was filed as a class action with the plaintiff class consisting of all those purchasing such shares during the period of the alleged conspiracy, *i.e.*, the fall of 1965 through August of 1967. Numerous other brokerage firms and individuals were named as and remain defendants.

Nagorsky's activities with reference to Hercules covered a time period of only three weeks, after which his employment terminated on October 8, 1965. The original complaint was filed in this case on February 19, 1969. An amended complaint, twenty-eight pages in length, was filed, drawing largely on a criminal indictment of various individual members of the conspiracy for its factual detail.[1] The bulk of the facts alleged did not involve Rodman or the other brokerage house defendants.

Proceedings in the Trial Court.

Suit was filed on February 19, 1969. Various motions directed against the original complaint and the subsequent amended complaint were made, resulting in the opinion of Judge Decker (Appendix A, pps. A1-A12). Included in the motions was the position that the cause of action could not be asserted under Rule 10(b)5 for conduct which, as Judge Decker found, "is completely encompassed within the proscriptions of § 9 of the

1. A report of the criminal aspect of the case is contained in *United States* v. *Projansky*, 465 F. 2d, 123 (2nd Cir. 1972). The reported case details the mechanics of the market manipulation here involved.

1934 Act." (Appendix A, page A3.) Judge Decker expressed "misgivings" in permitting the assertion of the claim, but believed that his holding was "dictated" by a prior decision of the Seventh Circuit in *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47 (1968).

Judge Decker also ruled that the relevant applicable statute of limitations was the Illinois five year statute applicable to fraud. Following the decision of the Seventh Circuit Court of Appeals in *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F. 2d 123 (1972), that the Illinois Securities Act of Chapter 121½, Section 137.13D 1973 Ill. Rev. Stat., a three year statute, applied to a Rule 10(b)5 action, Rodman moved for summary judgment on the ground that the period had run.

Judge McMillen denied the motion on the ground that general allegations of conspiracy tied Rodman to the action within the three year period. Rodman renewed its motion as a motion for judgment on the pleadings based upon the generality of the pleadings and the specificity required under Rule 9(b) of the Federal Rules of Civil Procedure. This motion was granted (Appendix A, pps. A13-A14). Subsequently, Judge McMillen entered an order rendering the judgment final as to Rodman (Appendix A, pps. A15-A18).

The Decision of the Court of Appeals.

In the Court of Appeals, Rodman renewed its argument that a cause of action could not be maintained under Rule 10(b)5 at the expense of the protection, particularly the limitations, of § 9 of the 1934 Act. The Court held that the remedies under Rule 10(b)5 and 9(a)(2) are "cumulative and not mutually exclusive" and afforded plaintiffs the option to make their claims under either or both (Appendix A, pps. A24-A26).

The Court further permitted plaintiffs to maintain their action under § 17 of the 1933 Act against Rodman's argument that no right of action may be implied thereon and forbore ruling on

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Rodman's contention that, if such an action exists, a privity requirement would preclude its assertion in the circumstances of this case (Appendix A, pps. A26-A27).

With reference to limitations, Rodman urged that the statute began running as of the time that Nagorsky left its employment and was not tolled as to it because its liability was simply vicarious and it was not charged with active complicity in the fraud and because no facts were pleaded, sufficient to satisfy Rule 9(b) of the Federal Rules of Civil Procedure, to toll the statute.

The Court of Appeals refused to accept these arguments, holding that the complaint sufficiently alleged Rodman's negligence, which, the Court held, tolled the statute as to Rodman (Appendix A, p. A32).

Finally, the Court of Appeals upheld Judge Decker's decision dismissing a count seeking recovery under the antitrust laws for the same conduct alleged to violate the Securities Acts. Anomalously, the Court decided that matters specifically and squarely covered by § 9 of the 1934 Act, "intended to be fully dealt with under the securities acts" were not actionable under the far more general proscriptions of the Sherman Act (Appendix A, pps. A37-A40).

A Petition for Certiorari on behalf of the plaintiff class has been received by counsel for Rodman & Renshaw, on April 30, 1975, apparently filed with this Court on or about said date; a separate reply thereto will be furnished.

REASONS FOR GRANTING THE WRIT.

The issues of this case are of importance in determining whether any barriers exist to the spate of litigation spawned by Rule 10(b)5.

The Court of Appeals for the Seventh Circuit has decided questions of Federal law, which have never been ruled upon

by this Court, in a way which departs from principles announced in this Court's decisions, decisions of other Federal courts, and expressed policies of Congress.

The effect of the Court's decision, permitting plaintiffs to maintain an action under Rule 10(b)5 for conduct squarely proscribed by § 9 of the Securities Exchange Act which grants a damage remedy and limits the time within which suit may be brought, is to supplant the announced policies of Congress, strip defendants of protections thereby intended, and swallow the particulars of the Securities Act in the generalities of Rule 10(b)5.

The Court's pronouncements on limitations are also contrary to this Court's decisions, those of other circuits, other applicable authority and an unwarranted extension of liability to those charged only with negligence and not with fraud.

This Court has already granted certiorari in ***Hochfelder*** v. ***Ernst & Ernst***, 503 F. 2d 1100 (7th Cir. 1974), cert. granted, April 14, 1975, ... U. S. ....., and that cause is still pending. Included among the questions presented there is the same limitation question presented here as to the tolling of the statute where the defendant is charged with "negligent facilitation and implementation of fraud."

Finally, this case affords an opportunity for this Court to consider whether Federal policy is best served by resort to the limitation periods of the various states for a determination of the timeliness of actions for which a cause of action is implied under those Acts instead of applying the analogous limitations applicable to the express civil remedies under the Securities Acts.

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ARGUMENT.

I.

The Decision Below Establishes for the First Time That an Action for Damages May Be Maintained Under Rule 10(b)5 for Conduct Squarely Proscribed by Section 9 of the 1934 Act, and Eliminates the Protections Granted by Section 9 in Contravention of Longstanding Canons of Construction Uniformly Adhered to by All Federal Courts.

In the enactment of the Securities Exchange Act of 1934, § 9(a)(2) was deemed "the very heart of the Act" by the Securities Commission.[2] The metaphor was apt for, as the heart has a two way function, so does § 9. § 9 grants a right of action to those suffering injury as a result of market manipulation on a national exchange but affords defenses to those charged. § 9(e) provides that the court could require a cost bond, could award attorney's fees against either litigant, could require contribution among defendants, and, finally, provides for a limitations period, limiting the timeliness of suit to one year after discovery of facts constituting the violation with an outer limit of three years after the violation.

In its opinion, the Court of Appeals has managed a by-pass operation on the Act's "heart". By permitting plaintiffs to proceed under Rule 10(b)5 at their election,[3] the Court has eliminated any necessity for § 9 as a basis for any claim and has stripped defendants of the protection of § 9(e)'s limitation period.

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2. Loss, Securities Regulation Vol. 3, p. 1549 (2d Ed. 1961).

3. An entertaining and, hopefully, overstated view of the permissiveness of Courts with reference to Rule 10(b)5, is "A BRIEF COMMENTARY ON THE CURRENT STATE OF THE CASE LAW UNDER RULE 10(b)5 of THE SECURITIES AND EXCHANGE COMMISSION"; Enright and Sosin, Vol. 30, Business Lawyer, p. 987.

In so doing, the Court has disregarded canons of statutory construction, the durability of which is directly traceable to their fundamental logic. Indeed, these canons were applied in disposing of plaintiffs' claim that the conduct condemned by § 9(a)(2) was also actionable under the generalities of the Sherman Act.

Much of the authority was cited and relied upon in the latter connection by Judge Decker in his opinion (Appendix A, pages A4-A5), endorsed in the Court of Appeals:

> "As previously noted, section 9 of the 1934 Act expressly prohibits the type of stock market manipulation here alleged. The Sherman Act's prohibition, on the other hand, is addressed more generally to contracts, combinations and conspiracies 'in restraint of trade or commerce.' As stated in Montague v. Electronic Corporation of America, 76 F. Supp. 933, 936 (S. D. N. Y. 1948), involving an apparent overlap of remedies under section 11 of the 1933 Act and section 10(b) of the 1934 Act:
>
> > 'The settled rule of statutory construction is that, where there is a special statutory provision affording a remedy for particular specific cases and where there is also a general provision which is comprehensive enought to include what is embraced in the former, the special provision will prevail over the general provision, and the latter will be held to apply only to such cases as are not within the former. United States v. Chase, 135 U. S. 255, 260, 10 S. Ct. 756, 34 L. Ed. 117, Ex Parte United States, 226 U. S. 420, 424, 33 S. Ct. 170, 57 L. Ed. 281, Kepner v. United States, 193 U. S. 100, 125, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655; D. Ginsberg & Sons, Inc. v. Popkin, 285 U. S. 204, 208, 52 S. Ct. 332, 76 L. Ed. 704.'
>
> To the same effect, see Jackson v. Cravens, 238 F. 117 (5th Cir. 1916); Jackson v. Chicago, R. I. & P. Ry. Co., 178 F. 432 (8th Cir. 1910); cf. N. L. R. B. v. Drivers, etc., Local Union No. 639, 362 U. S. 274, 291-292, 80 S. Ct. 706, 4 L. Ed. 2d 710 (1960)."

In the *Ginsberg* case, cited by Judge Decker, this Court, 285 U. S. 204, 208, stated:

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> "General language of a statutory provision although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

The Court in *Ginsberg* went on, in terms descriptive of the effect of the Court of Appeals' opinion on the continued efficacy of § 9(e), "The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." The effect of the Court of Appeal's decision is the elimination of § 9 and its limitations.

The precedential value of these cases was enhanced by the relatively recent case of *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458 (1974). This Court explained:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Mills v. United States, 278 U. S. 282, 289, 73 L. Ed. 379, 49 S. Ct. 129 (1929). This principle of statutory construction reflects an ancient maxim-expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are exclusive means to enforce the duties and obligations imposed by the Act."

The Court went on to point out that even such a basic principle would yield to evidence of Congressional intent to the contrary, but whatever the intent of Congress was with reference to §10, it was not the elimination of § 9.

In a very real sense, the existence or non-existence of an implied right of action under § 10 and Rule 10(b)5 is a

spurious issue. Even if a right of action under this Section or its Rules was provided for by Congress, the specific remedy of § 9(e) would, under governing authority, be the sole damage remedy available for a violation of § 9(a)(2) which, in Judge Fairchild's phrase in the present case "specifically described the activity * * * and declared it unlawful."

Remedies may be "cumulative and not mutually exclusive," as concluded by the Court in *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47, 50, (7th Cir. 1968) but it does not follow from this that damage provisions may be cumulated within the framework of a single Act. The authorities cited are to the contrary.

The note in 77 Harvard Law Review 285 "Implying Civil Remedies From Federal Regulatory Statutes" emphasized that the case for implying a remedy under such statutes is based upon congressional intent expressed in the particular statute and upon inadequacies of remedy in the absence of such implication in the § 10(b) situation and stated at page 297:

> "* * * buyers and sellers should not in cases of overlap be able to use a 10(b) action to avoid the limitations placed on the express remedies. The implication of private remedies does rest on the premise that those expressly provided are to some extent inadequate. However, effectively altering the express incidents of the remedies created by Congress is much more difficult to justify than is the creation of independent remedies."

As the quotation in the Court of Appeals opinion from *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1971)[4] affirms, § 10 of the 1934 Act and Rule 10(b)5 "are broad and by repeated use of the word 'any' are meant to be inclusive.[5]

4. It should be noted that, while this case sustains a private right of action under Rule 10(b)5, the manipulation there did not involve a manipulation on a national securities exchange, so the case is not authority for sustaining an additional action for conduct subject to § 9.

5. Mr. Loss in Vol. VI, Supplement to Second Edition, Securities Regulation, p. 3528, notes the antecedents of § 10(b): "Its juxtaposition in the statute—following, as it does, a number of provisions

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It is the breadth and generality of § 10 and its Rule which must yield to the particular where, in the Court of Appeals own words, "the alleged market rigging scheme also falls squarely with in §§ 9(a)(2)." (Appendix A, p. A25.) Otherwise the caboose has been transformed into the locomotive.

Here plaintiffs delayed suit more than eighteen months after discovery of the fraud and more than three years after any conduct of Nagorsky could have formed any basis of liability vis-a-vis Rodman. If governed solely by § 9, plaintiffs rights, if any, against Rodman were lost by their procrastination.

The Court of Appeals has, then, decided an important question under the Securities Act of 1934 in a manner at variance with authority, at variance with basic principles of statutory construction, and, it should be added, at variance with justice in this partciular case. For these reasons, this Court's writ should issue.

II.

The Decision of the Court Below That a Right of Action May Be Implied and Maintained Under Section 17 of the 1933 Act Is Contrary to Decisions of Other Federal Courts, to the Plan of the Statute, and to Learned Commentators' Views.

Rodman urged that no private right of action could be implied under § 17. Rodman also urged that, if such an action was implied, the terms of the 1933 Act required privity between plaintiffs and defendants, non-existent here for the present suit is a class action of *all* purchasers of Hercules stock during the period involved. These purchases were made in the open market and no claim of privity as to defendants has been made.

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of §§ 9 and 10(a) designed to curb or regulate such practices as market manipulation, trading in puts and calls, short selling, and stop loss orders—clearly marks the section as an omnibus provision that was inserted for good measure. When the Administration's spokesman, Mr. Corcoran, was describing the bill in the legislative hearings, he devoted a single sentence to what is now § 10(b): "Subsection (b) says, "Thou shalt not devise any other cunning devices."'"

The Court opinion is somewhat equivocal on these points, stating "we need not deal with" the issue as to an implied right of action but quoting from Judge Friendly's opinion in *SEC* v. *Texas Gulf Sulphur Corp.*, 401 F. 2d 833, 867 (2d Cir. 1968), cert. denied, sub nom., *Coates* v. *SEC*, 394 U. S. 976 (1969), as there being "little practical point in denying the existence of such an action" if a Rule 10(b)5 action was also pending. The Court here permitted the § 17 claim to stand and forbore ruling on the privity requirement (Appendix A, pps. A26-A27).

If, as urged, an action under Rule 10(b)5 is not maintainable, the point is intensely practical for the limitations issue would then present the sole bar to maintenance of this action.

Loss, *Securities Regulation*, Vol. 3, p. 1785 (2d Ed. 1961) analyzed the implied right under § 17 and concluded that, by the terms of the statute, no such right could be implied.[6] Judge Friendly favorably noted Professor Loss' analysis in *Texas Gulf Sulphur*. The analysis has been adopted in *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890, 903-905 (D. Me. 1971), *Hardy* v. *Sanson*, 356 F. Supp. 1034, at 1038 (N. D. Ga. 1973), and *Trussell* v. *United Underwriting, Ltd.*, 228 F. Supp. 757, 769 (D. Col. 1964). In *Reid* v. *Mann*, 381 F. Supp. 525 (N. D. Ill. 1974), all applicable authorities were canvassed. The Court there concluded that no such right existed.

On the privity requirement, *SEC* v. *American Beryllium & Oil Corp.*, 303 F. Supp. 912, 918 (S. D. N. Y. 1969) and *Holmberg* v. *Williamson*, CCH Fed. Sec. Law Rep. ¶ 90,710 (S. D. N. Y. 1955) are holdings that a privity requirement exists under the Act. In *DuPont* v. *Wyly*, CCH Fed. Sec. Law Rep. ¶ 94,381 (D. Del. 1973), the Court noted the requirement but also forbore ruling because of the pendency of a 10(b)5 claim.

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6. Among the authorities relied upon by Professor Loss is the article by Justice Douglas and Mr. Bates, The Federal Securities Law of 1933, 43 Yale L. J. 171, 181-182 (1933).

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On these authorities, no right of action may be implied under § 17 of the 1933 Act and, if such action was permitted, the present action could not stand for no privity exists between plaintiffs and Rodman.

This Court has not had occasion to consider these matters. As Loss further notes in his Supplement to the 2d Edition of *Securities Regulation*, Vol. 6, page 3914, a number of courts have permitted such implied rights of action. Mr. Loss believes "the only considered opinions" are to the contrary.

The Court thus has the opportunity to resolve the conflict posed by these decisions.

III.

The Decision Below, Permitting Tolling of Limitations Against Those Charged with Negligently Facilitating Fraud, Is Contrary to the Decisions of This and Other Courts Which Permit Such Tolling Only as to Those Actively Committing or Concealing the Fraud.

The Seventh Circuit seems to have more than its share of plaintiffs, who by procrastination or otherwise, run afoul of limitations problems. Prior to the time of decision in this case, the Court was committed to extension of the tolling doctrine well beyond its historical antecedents.

In a series of cases beginning with *Hochfelder* v. *Midwest Stock Exchange*, 503 F. 2d 364 (7th Cir., 1974), *Hochfelder* v. *Ernst & Ernst*, 503 F. 2d 1100 (7th Cir., 1974), cert. granted ..... U. S. ....., April 14, 1975, and the present case, the Court has tolled the running of the borrowed statute. In *Midwest*, charges of "negligent acts facilitating the fraud" were held to toll the statute as to a defendant not charged with the fraud itself. In *Ernst*, the court repeated its holding of *Midwest* and tolled the statute. Here the Court again repeated its holding tolling limitations against "defendants such as Rodman

& Renshaw who have facilitated by their negligence a Rule 10(b)5 fraud." (Appendix p. A32.)

This holding is contrary to previous decisions of this Court, as well as others.

In the first of the cases relied upon by the Court of Appeals in its *Midwest* opinion, *Bailey* v. *Glover*, 21 Wall. 342 (1875), the tolling of statutes of limitation in fraud cases was limited to those committing or fraudulently concealing the fraud, for "[t]o hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time *as the party committing the fraud* could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure." 21 Wall. 349. (Emphasis supplied.)

Bailey was cited, quoted and followed in *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), an action against the party fraudulently concealing the cause of action. The quotation, in part, was "* * * The bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts *on the part of the party committing the fraud to conceal it* from the knowledge of the other party." (Emphasis supplied.)

As both of these quotations make clear, the rationale of tolling the statute of limitations during the period of ignorance is directed only at those committing the fraud or fraudulently concealing from plaintiffs their cause of action.

That this is the proper interpretation of the doctrine is evident from preceding and later case law.

Bailey and *Holmberg* rely upon, among other cases, *Sherwood* v. *Sutton*, 5 Mass. 143, 21 Fed. Cas. page 1303, Case 12, 782 (1828). The opinion in that case was written by Justice Story, then sitting in the Circuit Court. There, Justice Story canvassed the English cases and concluded "[t]hat the construction adopted by these courts, that the concealment of the fraud avoids the bar

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of the statute of limitations, is founded in solid sense, and is a natural limitation upon the language of the statute."

Significant to the present point he referred to "the leading case of *Bree* v. *Holbech,* 2 Doug. 655, where upon the face of the pleadings, the direct question was put, whether fraud would, if concealed, put aside the plea of the statute of limitations."

Justice Story went on (page 1305, 21 Fed. Cas.):

> "The difficulty in that case was, that the replication did not impute any fraud to the defendant, though it was clear, that the mortgage was a mere forgery. Lord Mansfield there said, 'there may be cases, too, which fraud will take out of the statute of limitations. But here, everything alleged in the replication may be true, without any fraud on the part of the defendant. If he (the defendant) had discovered the forgery, and then got rid of the deed, as a true security, the case would have been very different.' "

Justice Story held that, at law, as well as in equity, "The court would violate a sound rule of law, if it permitted a defendant to avail himself of *his own* fraud." (Emphasis supplied.)

The *Bree* case, examined by Justice Story was decided in 1781. The decision was also cited by the court in *Bailey. Bree* involved suit against the administrator of an estate arising from the sale by the decedent of a forged mortgage "one of the many forgeries committed by one Dadley, an attorney in eminent practice at Coventry, and which were not discovered till after his death."

Defendant urged the court that no fraud was "stated to have been practiced by the defendant." Plaintiff urged that the limitation period "does not run, or, at least, only runs from the time the fraud is discovered" and, in a modern tone, "if any loss had been incurred by his [decedent's] mistake, it ought to fall upon him, not upon an innocent third person."

It was upon these arguments that Lord Mansfield pointed out that fraud was not charged against the decedent. His statement, that there may be cases which fraud will take out of the statute, was immediately qualified in context "here, everything alleged in

the replication may be true, without any fraud on the part of the defendant." The same is true here.

The *Sherwood* case was decided in the October Term of 1828. In the June Term of the Circuit Court for the District of Rhode Island, Justice Story rendered an opinion in *Pratt* v. *Northam*, 5 Mas. 95, 19 Fed. Cases p. 1254, case number 11,376. The probate estate of a surety on a bond of an administrator for minors was sued for the administrator's fraud. Against the position of the plaintiffs that the fraud rendered the statute inapplicable, Justice Story had this to say:

> "But it is said, that here is a case of fraud and that fraud, even at law, constitutes a good exception to the statute of limitations; and a fortiori has been often admitted in equity. This, in a general sense, is true as is the common statute of limitations. *But then the fraud must be the fraud of the party, setting up the bar of the statute.*" (Emphasis supplied.)

Other similar holdings exist. In *Hayden* v. *Thompson*, 71 F. 60 (8th Cir., 1895), suit was brought against shareholders of a bank who were recipients of a fraudulently declared dividend. The plaintiff, against the bar of the applicable limitations raised by one of the defendants, urged fraudulent concealment by directors of the bank and certain of the defendants but "nowhere alleges that this defendant either had knowledge of or concealed these facts." 71 F. 70. The court correctly reasoned:

> "The reason of the rule that the time limited by the statute for the commencement of an action for fraud shall not commence to run while the defendant conceals it is that he ought not to be permitted to take advantage of his own wrong. Neither the reason nor the rule has any application to a cause of action which is fraudulently concealed from the parties in interest by third persons. The fraudulent concealment of the defendant alone will delay the running of the statute."

In support of this conclusion, the court cited *Pratt* v. *Northam*, discussed above and, *inter alia*, *Stevenson* v. *Robinson*, 39 Mich.

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160 (1878). The sole issue there was the bar of the statute against a claim of fraudulent concealment. The court held:

> "There is no pretense whatever that either of the defendants made any representations in relation to this claim, or that they or either of them concealed any fact from plaintiff's knowledge. The claim is that one Pease, who was a clerk in the office of defendants and had charge of the collection of this claim, fraudulently concealed from her the fact that the claim had been collected. Even if this were true it would be insufficient. The provisions of this section cannot be extended by construction to concealments made by persons other than those sought to be charged in the action."

Stevenson was cited and relied upon in *Bryan* v. *United States*, 99 F. 2d 549, 552 (10th Cir. 1938), *cert. denied*, 305 U. S. 661 (1939) where the plaintiff alleged the complicity of government agents with plaintiff's faithless employees in fraudulent submission of tax returns and fraudulent concealment of their actions against the bar of limitations. One of the court's answers to this argument, peculiarly appropriate here, follows:

> "The United States is not liable for unauthorized wrongs inflicted by its officers or agents on its citizens, although occurring while engaged in the discharge of official duties. Schillinger v. United States, 155 U.S. 163, 167, 15 S.Ct. 85, 39 LEd. 108. The fraudulent concealment must have been that of the party sought to be charged, and a fraudulent concealment by one who stands in the relation of agent to another will not bind the principal, unless the latter induced or had knowledge thereof."

In *Coombes* v. *Getz*, 217 Cal. 320, 18 P. 2d 939 (1933), the Supreme Court of California considered the statutory liability of a corporate director to creditors or shareholders of the corporation "for all moneys embezzled or misappropriated by the officers of such corporation * * * during the term of office of such director * * *." The analogy of this type of statute to the "controlling person" liabilities of the Securities Acts is obvious.

A California limitations statute provided that a cause of action grounded on fraud was not deemed to have accrued until the

discovery, by the aggrieved party, of the facts constituting the fraud. The court, 18 P. 2d at 945, 946, held that this did not apply:

> "The rule that an action brought for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud applies only when the fraud, which is the basis of the action, is the fraud of the defendant in the case. It has no application when the fraud charged is that of a third party." (Citing and quoting, and relying on Hayden v. Thompson, hereinbefore cited.)

The principle enunciated contains its own rationale; the application of the principle in master-servant or principal-agent situations and to a statutory vicarious liability situation in the cases cited vindicates its applicability here. As expressed by Lord Mansfield in the quotation by Justice Story "everything alleged" in the amended complaint here "may be true, without any fraud on the part of the defendant" Rodman.

More recent cases are cited in this connection in the petition for certiorari filed on behalf of Ernst & Ernst. *Detroit* v. *Grinnell Corp.*, 495 F. 2d 448 (2d Cir. 1974) and *Public Service Co.* v. *General Electric Co.*, 315 F. 2d 306, 310 (10th Cir. 1965), *cert. denied*, 83 S. Ct. 1695 (1963). These cases further demonstrate the Court of Appeals' error as well as the conflict in circuits.

IV.

The Decision Below and Other Decisions Borrowing State Limitations Statutes and Applying the Borrowed Statutes to Implied Causes of Action Under the Securities Acts Have Never Been Reviewed by This Court. The Limitations Periods of the Express Remedies of the Securities Acts Should Be Applied.

The Seventh Circuit has, by its decisions, adopted the three year limitations period of the Illinois Securities Act of 1953 (§ 137.13D, Chapter 121½, Ill. Rev. Stat.) as applicable to

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Rule 10(b)5 actions. To the three year statute, it has added a long standing judicial gloss:

> "We must read into the three year limitations applied in the Rule 10(b)5 count the 'equitable doctrine' that the statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud remains in ignorance of it without any fault or want of diligence or care on his part . . ." *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F. 2d 123, at 128 (1972).[7]

A strong question exists as to whether state statutes of limitations should be applied to any right of action under the Securities Acts. Apart from the Securities Acts, no case has come to our attention where a court has implied a right of action under a statute creating explicit rights, circumscribed such explicit rights by specific limitations, and yet "borrowed" limitations outside of the statutory framework creating such rights. Understandably, this Court has never sanctioned such borrowing.

The decision of this Court in *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 2 L. Ed. 2d 1272, 78 S. Ct. 1201 (1958) may be read as condemning such borrowing.

There, this Court held that a state statute of limitations governing an action based upon unseaworthiness of a vessel could not be shorter than the period prescribed by Congress for an action based upon negligence under the Jones Act. The Court notes that such actions were but "alternative grounds" of recovery for a single cause of action and mandated the three year federal statute as fixing the minimum limitation the state could impose. The Court, of course, expressed no opinion as to whether a state statute could exceed the federal

7. *Parrent* was concerned with selection of the appropriate statute of limitations and is one of many cases involving the selection of limitations of a forum state as between limitations governing common law fraud or the type of fraud actionable under the Blue Sky laws of the forum. See for example, *Charney* v. *Thomas*, 372 F. 2d 97 (6th Cir. 1967 and *Vanderboom* v. *Sexton*, 422 F. 2d 1233 (8th Cir. 1970). The first of the named cases opted for the common law fraud statute; the second, for the Arkansas Blue Sky's limitation.

statute, but, unless plaintiffs are, *per se*, entitled to more favorable treatment than defendants, it would appear that such limitation period could not exceed the federal statute. The case does stand for the proposition that expressed federal limitations policies will be enforced against those of the states where the actions have a common factual basis. This obtains here.

The desirability of uniform limitations was a theme of *International Union* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 16 L. Ed. 2d 192, 86 S. Ct. 1107 (1966), with the majority opinion declining to fashion a uniform limitation period for suits brought under § 301 of the Labor Management Relations Act of 1947 on the basis that to do so would require a "drastic sort of judicial legislation, * * *." The dissenters, in that case noted the manifold problems involved in the application of rules with a fifty fold potential for difference, difficulties present in the securities area without, however, the necessity for "drastic" judicial legislation. It would appear that, if the congressional intent permitting the maintenance of implied actions under the Securities Acts is more than a judicial fiction, that same congressional intent would be to apply the limitations periods expressly incorporated in those acts for actions specifically created.

In connection with *Magnolia* and *Hoosier Cardinal*, Mr. Loss, in his work, Securities Regulations, Supplement to 2d Ed. 1961, pps. 3899-3900, has viewed these cases as support for the proposition the limitation periods of the Securities Acts should be applicable to Rule 10(b) actions:

> "As Mr. Justice White said, speaking also for Mr. Justice Douglas and Mr. Justice Brennan in International Union, United Automobile, Aerospace & Agriculture Implement Workers of America v. Hoosier Cardinal Corp., 383 U.S. 696, 709 (1966), supra p. 3897:
>
> > '* * * the cases also establish that the silence of Congress is not to be read as automatically putting an imprimatur on state law. Rather, state law is applied only because it supplements and fulfills federal

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policy, and the ultimate question is what federal policy requires.'

"True, that was a dissenting opinion. But there is no reason to assume that the majority would have disagreed with the quoted statement in the abstract; in the *United Automobile Workers* case there simply was no federal statute of limitations that was remotely analogous.

"When such a statute does exist—vide § 13—is it not eminently more consistent with the overall statutory scheme to look to what Congress itself did when it was thinking specifically of private actions in securities cases rather than to a grab-bag of more or less analogous state statutes? Indeed, should not the courts look to § 13 of the 1933 act—or, better yet, § 29(b) of the 1934 act—as a point of reference for creating a limitation period binding on *all* 10b-5 plaintiffs, sellers as well as buyers?

* * * * *

In support of the thesis here stated, see Schulman, Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion, 13 Wayne L. Rev. 635 (1967); Israels, Book Rev., 77 Yale L. J. 1585, 1591-92 (1968)."

The application of the year from discovery, three year from violation limitation common to the Securities Acts would simplify judicial administration, adequately protect the status of putative plaintiffs and serve defendants with the protection against the difficulties of defending against stale and fraudulent claims which is the purpose of limitations.

CONCLUSION.

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois
Eastern Division.

ROBERT SCHAEFER, ET AL.,
Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Defendants.

No. 69 C 364

MEMORANDUM OPINION.

This is an action brought by purchasers of the stock of Hercules Galion Products, Inc. to recover damages for defendants' alleged conspiracy to manipulate the market for such stock. The complaint to manipulate the market for such stock. The complaint names stockbrokerage firms, their employees, and certain other individuals and corporations, alleging a detailed scheme whereby defendants are said to have created an artificially active market for Hercules Galion stock in order to raise its price so that certain defendants could sell their holdings at a profit. The complaint, brought as a class action, contains counts based on the securities laws, the anti-trust laws, and the doctrine of common law fraud.

A number of motions to dismiss have been filed. Those of general applicability will be considered first; then those relating to specific defendants or plaintiffs will be discussed.

Count 1—the Securities Acts.

Count 1 of the complaint states that defendants have violated sections 9, 10 and 15(c) of the Securities Exchange Act of 1934 and sections 12(2) and 17 of the Securities Act of 1933. Section 9 of the 1934 Act and section 12(2) of the 1933 Act have their own express limitations periods, while the other cited sections have none. Actions brought pursuant to section 9 must be commenced "within one year after discovery of the facts constituting the violation and within three years after such violation," (§ 9(e)). Actions pursuant to section 12(2) must be brought within one year after discovery of the untrue statement or omission, or after it should have been discovered, and within three years after the sale (§ 13 of the 1933 Act). The five year Illinois statute of limitations for fraud (83 Ill. Rev. Stat. § 16) applies, however, to actions brought under § 17 of the 1933 Act and § 10(b) of the 1934 Act. *Morgan* v. *Koch*, ... F. 2d ..... (7th Cir. 1969, No. 17447); *Northern Trust Company* v. *Essaness Theaters Corporation*, 103 F. Supp. 954 (N. D. Ill. 1952); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2d Cir. 1951).[1]

Many of the defendants in this cause were indicted for their alleged activity by a federal grand jury in New York in August, 1967. Because the complaint in this action was not filed until February, 1969, defendants contend that the action was commenced more than one year after discovery of the violation. They further argue that, since the alleged scheme falls within the prohibitions of § 9 and § 12(2), the other provisions of the Acts should not apply and therefore the one year time bar applicable to § 9 and § 12(2) requires dismissal of count 1.

1. Defendants argue that these and other cases applying state statutes of limitations are not well reasoned and should be disregarded in favor of application of one of the limitations provisions found in the Securities Acts. The doctrine of borrowing state limitations statutes is firmly entrenched in this and other Circuits, and for that reason is not open for consideration by this court. See 3 Loss, *Securities Regulation*, pp. 1771 *et seq.*

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Defendants' argument is logically persuasive. There is no dispute about their claim that the market rigging scheme alleged in the complaint is completely encompassed within the proscriptions of section 9 of the 1934 Act. To hold that the more expansive provisions of section 10(b) or section 17 apply, with their longer statutes of limitations, is to ignore the express limitations incorporated in the Act. And it assumes that the carefully inserted time limitation in section 9(e) was repealed, *sub silentio*, by passage of section 10(b) of the same Act, or was rendered meaningless *ab initio* by prior passage of the 1933 Act. Furthermore, it ignores the rationale of implied remedies under the Securities Acts enunciated in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), where the Court made it clear that remedies were to be created "when necessary to make effective the congressional purpose." 377 U. S. at 433. When the congressional purpose has been congressionally implemented by statutory creation of remedies, as it was in §§ 9 and 12 (2), the need for judicial implementation of its purpose is certainly diminished.

Despite these misgivings, however, I am constrained to hold that plaintiffs may maintain this action pursuant to section 10 (b), Rule 10b-5, and section 17. Such a holding is dictated by the decision of this Circuit's Court of Appeals in *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47 (7th Cir. 1968). The plaintiffs in that action sued brokerage houses, their employees, and the issuing corporation claiming that defendants fraudulently induced them to purchase certain debentures. The District Court dismissed count 1, which was premised on a violation of Rule 10b-5, because of its conclusion that the allegations of the complaint fell squarely within the prohibitions of § 12 (2) of the 1933 Act. On appeal, the defendants also argued that § 15 (c) (1) of the 1934 Act controlled and barred suit under Rule 10b-5. In its reversal, the Court of Appeals rejected these arguments, concluding that "the remedies supplied by and under these acts are cumulative and not mutually exclusive." 401 F. 2d at 51.

No meaningful distinction appears between the *Jordan* case and the instant action. The broad and virtually unlimited role which the Court there assigned to Rule 10b-5 has equal applicability here. Accordingly, plaintiffs are not limited to the provisions of § 9 or § 12 (2), but may also bring this action pursuant to § 17 of the 1933 Act and §§ 10 and 15 (c) of the 1934 Act. The motions to dismiss count 1 in its entirety because of the short statutes of limitations applicable to §§ 9 and 12 (2) must therefore be denied. See also *Klein* v. *Spear, Leeds, Kellogg, et al.* (S. D. N. Y. 1969), CCH, Fed. Sec. L. Reports, ¶92,454; *Osborne* v. *Mallory*, 86 F. Supp. 869 (S. D. N. Y. 1949); *Acker* v. *Schulte*, 74 F. Supp. 683 (S. D. N. Y. 1947).

Nor can this court conclude on the record before it that references to §§ 9 and 12 (2) must be stricken from the complaint as barred by the short statutes of limitations. Defendants have filed extracts from the depositions of certain plaintiffs which indicate that they had knowledge of the criminal indictment soon after it was returned, and more than one year before the complaint was filed. These are, of course, not properly before the court on motions to dismiss. And plaintiffs should have a chance to rebut them by submitting evidentiary material. Defendants' motions to dismiss directed to this aspect of count 1 are therefore denied without prejudice to reassertion of the same issue by motion for summary judgment.

Count 2—The Sherman Act.

In count 2 of the complaint plaintiffs reallege most of the allegations of count 1 and claim that defendants have violated section 1 of the Sherman Act, 15 U. S. C. 1. No cases have been found which discuss the applicability of the anti-trust laws to securities market rigging schemes. For reasons to be stated, I have concluded that count 2 fails to state a cause of action.

As previously noted, section 9 of the 1934 Act expressly prohibits the type of stock market manipulation here alleged.

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The Sherman Act's prohibition, on the other hand, is addressed more generally to contracts, combinations and conspiracies "in restraint of trade or commerce." As stated in *Montague* v. *Electronic Corporation of America*, 76 F. Supp. 933, 936 (S. D. N. Y. 1948), involving an apparent overlap of remedies under section 10 (b) of the 1934 Act:

> "The settled rule of statutory construction is that, where there is a special statutory provision affording a remedy for particular specific cases and where there is also a general provision which is comprehensive enough to include what is embraced in the former, the special provision will prevail over the general provision, and the latter will be held to apply only to such cases as are not within the former. *United States* v. *Chase*, 135 U. S. 255, 260 . . .; *Ex Parte United States*, 226 U. S. 420 424 . . .; *Kepner* v. *United States*, 195 U. S. 100, 125 . . .; *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 . . ."

To the same effect, see *Jackson* v. *Cravens*, 238 F. 117 (5th Cir. 1916); *Jackson* v. *Chicago, R. I. & P. Ry. Co.*, 178 F. 432 (8th Cir. 1910); cf. *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 291-292 (1960).

The anti-trust laws have been held inapplicable in other contexts when a more specialized remedy was provided. For example, the Court in *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500 (1936), held that a shipper had no action for damages under the anti-trust laws against a competitor and the railroad which had granted preferences to the competitor, but was limited to relief provided by the Interstate Commerce Act. Similarly, the anti-trust laws were held to be unavailing to a steamship line which sued its competitors, alleging a conspiracy to restrain trade. The Court held that the Shipping Act of 1916 provided a remedy which superseded the anti-trust laws. *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932). Compare *S. S. W., Inc.* v. *Air Transport Ass'n of America*, 191 F. 2d 658, 663 (D. C. Cir. 1951), which succinctly summarized the law:

> "Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws."

And see *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922).[2]

The authorities relied upon by plaintiffs do not weaken this long line of authority. In *United States* v. *Borden Co.*, 308 U. S. 188 (1939), a criminal case holding that the anti-trust laws were not impliedly repealed by the Agricultural Marketing Agreement Act, the latter Act did not provide a damage remedy for the kind of conduct covered by the Sherman Act. See the *1955 Report of the Attorney General's Commission to Study the Anti-trust Laws*, at 282. Similarly, in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), which held that the Bank Merger Act did not impliedly repeal the Clayton Act as it applied to bank mergers, the Court noted that the Bank Merger Act had no provision whatever for judicial proceedings and that the legislative history of that Act contained express statements to the effect that the applicability of the anti-trust laws was not affected. 374 U. S. at 351, 352.

Plaintiffs also point out that both the Securities Act of 1933[3] and the Securities Exchange Act of 1934[4] contain clauses

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2. Cases dealing with SEC or stock exchange rules or regulations allegedly violative of the anti-trust laws, see *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *Kaplan* v. *Lehman Brothers*, 371 F. 2d 409 (7th Cir. 1967); *Baum* v. *Investors Diversified Services, Inc.*, 286 F. Supp. 914 (N. D. Ill. 1968), *aff'd.* 409 F. 2d 872 (7th Cir. 1969), would only be relevant if plaintiffs based their claim for relief on the pegging of prices which was lawful under Commisison regulations, which could occur under section 9(a)(6) of the 1934 Act. The language of the complaint indicates, however, that plaintiffs rely on section 9(a)(2), an unqualified prohibition, rather than on section 9(a)(6).

3. "Sec. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity."

4. "Section 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to

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preserving "rights and remedies that may exist at law or in equity." They argue that remedies under the Sherman and Clayton Acts, which pre-date the Securities Acts, are therefore saved by these provisions.

There are two primary difficulties with plaintiffs' arguments. First, it assumes that a remedy for stock market manipulation at one time existed under section 1 of the Sherman Act. Yet there are no cases to support this contention. And it appears that, at common law, a market manipulation scheme such as is here alleged constituted fraud and not common law restraint of trade. *Barret & Co.*, 9 S. E. C. 319, 328 (1941); *Halsey, Stuart & Co., Inc.*, 30 S. E. C. 106 (1949); Berle, Stock Market Manipulation, 38 *Col. L. R.* 393 (1938). Because the interpretation of "restraint of trade" in the Sherman Act is to be given the meaning it had at common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498 (1940), the logical conclusion is that stock market manipulation schemes have never been within the coverage of the Sherman Act. And of course a non-existent remedy cannot be saved by the Securities Acts provisions cited above.

Moreover, as will be more fully discussed *infra*, the 1934 Act expressly limits recovery thereunder to actual damages, and the 1933 Act has been similarly construed. The language of the 1934 Act which limits damages is found immediately after the "saving clause" language,[5] indicating that only single damage remedies were to be preserved.[6] Thus, even if there once existed a Sherman Act cause of action for market manipulation, it was not saved by the later Securities Acts.

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maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. . . ."

5. For the pertinent text, see note 4 supra.

6. See House Report 1383, accompanying H. R. 9323, 73rd Congress, Second Session, relating to what became section 28:

"This subsection reserves rights and remedies existing outside of those provided in the Act, but limits the total amount recoverable to the amount of actual damages."

Finally, it is worth noting that a number of inconsistencies would result if plaintiffs were permitted to pursue both a Sherman Act and Securities Act cause of action. Beyond the differences in recoverable damages just referred to, there are significant differences in the governing statutes of limitation; compare section 13 of the 1933 Act and sections 9(e) and 18(c) of the 1934 Act with 15 U. S. C. 15b, and in the provisions for attorney's fees, compare section 9(e) of the 1934 Act with 15 U. S. C. § 15. These differences are substantial and would encourage investors to bring suit under the Sherman Act. Certainly Congress could not have intended that the damage restrictions contained in the carefully drawn prohibitions against market manipulation in the 1934 Act could be evaded and effectively nullified by the simple expedient of invoking the Sherman Act.

Count 3—Common Law Fraud.

Count 3 of the complaint incorporates the substantive allegations of count 1 but states that plaintiffs' right to recovery is based on common law fraud. Defendants' principal attack on this count is that, if counts 1 and 2 are dismissed, count 3 must also be dismissed since it contains no independent grounds of jurisdiction. Since this court has held, *supra*, that count 1 states a cause of action, defendants' contention is without merit. This court has pendent jurisdiction under the doctrine enunciated in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966).

Certain defendants also claim that plaintiffs who have had no direct dealings with defendants will be unable to prove the elements of fraud necessary to permit recovery. The issues thus raised are factual, however, and cannot be resolved on the pleadings.

Motion to Dismiss Plaintiffs Robert and Sandra Schaefer.

The plaintiffs who initially filed this complaint are Robert and Sandra Schaefer. Since that time other named plaintiffs

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have been added by motion. Certain defendants have now moved to dismiss the Schaefers from the complaint, claiming that they signed a covenant not to execute any judgment reached herein against certain defendants and that this instrument releases all defendants from liability to the Schaefers.

The Schaefers allege in the complaint that they have suffered out of pocket losses of $4,572.99 in their dealings in Hercules Galion stock. The covenant not to execute, involving six defendants, states that the Schaefers have received $9,000 and that they therefore will not execute any judgment against these six parties. Although the covenant expressly states that no other defendants are thereby released, the law is clear that when the consideration for release from one defendant fully compensates the plaintiff for his alleged injury, all jointly liable defendants are also released. *Wagner* v. *C. & A. R. R. Co.*, 265 Ill. 245 (1914); *Husky Refining Co.* v. *Barnes*, 119 F. 2d 715 (5th Cir. 1941); *Rector* v. *Warner Bros. Pictures*, 102 F. Supp. 263 (S. D. Cal. 1952). The issue therefore becomes whether the $9,000 payment constituted full compensation to plaintiffs.

Under the Securities Acts, it is now authoritatively established that only actual, and not punitive, damages are recoverable. Section 28(a) of the 1934 Act so provides, see *Green* v. *Wolf Corporation*, 406 F. 2d 291 (2d Cir. 1968), *cert. den.* 395 U. S. 977, and the same limitation has been placed on the provisions of the 1933 Act by judicial interpretation. *Globus* v. *Law Research Services, Inc.*, 418 F. 2d 1276 (2d Cir. 1969); *Avern Trust* v. *Clarke*, 415 F. 2d 1238 (7th Cir. 1969). Moreover, "actual damages" under the Acts have been uniformly held to be limited to out of pocket losses, and do not include any speculative loss of profits. *Kohler* v. *Kohler Co.*, 208 F. Supp. 808, 825 (E. D. Wis. 1962), *aff'd.* 319 F. 2d 634 (7th Cir. 1963); *Estate Counseling Service, Inc.* v. *Merrill, Lynch, Pierce, Fenner & Smith*, 303 F. 2d 527, 533 (10th Cir. 1962); *Chaney* v. *Western States Title Insurance Company*, 292 F. Supp. 376 (D. Utah, 1968).

The Schaefers have received more than their out of pocket losses, measured by the difference between the allegedly inflated prices they paid for the securities in suit and the amount they received on their subsequent sale. Therefore, they have been fully compensated for damages sustained by the alleged violations of the Securities Acts, and count 1 must be dismissed as to them.

The Schaefers also seek punitive damages under the common law count. However, as previously noted, section 28(a) of the 1934 Act limits recovery to single damages. Although common law remedies are expressly preserved, the conclusion is unavoidable that common law damage rules permitting recovery in excess of actual damages have not been saved. Cf. *Meisel* v. *North Jersey Trust Company of Ridgewood, N. J.*, 216 F. Supp. 469 (S. D. N. Y. 1963). Because the 1933 and 1934 Acts are to be construed *in pari materia, Globus* v. *Law Research Service, Inc., supra,* at 1286, and cases cited therein, the result is that punitive damages may not be recovered under common law doctrines for conduct actionable under the Securities Acts counts. Therefore, having been fully compensated, the Schaefers must be dismissed from the complaint.

Motions to Dismiss Particular Defendants.

Defendant Peltz has alleged in his motion to dismiss that the complaint neither shows any causal connection between his actions and plaintiffs' injuries nor adequately charges that he was a participant in a conspiracy. But the complaint charges that Peltz, as a registered representative for Hertz, Warner & Co., agreed with the other defendants to artificially raise the price of the securities, received money from other defendants to induce their customers to buy Hercules Galion stock, and concealed these payments from buyers of this security. The complaint alleges an overall conspiracy and a number of overt acts—this is sufficient to withstand a motion to dismiss.

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Peltz' causation argument amounts to a contention that no privity exists between himself and the plaintiffs. However, of the statutory provisions relied upon only § 12(2) expressly limits recovery to those in privity with the defendant. And the cases state that privity is not required for an action to be maintainable under Rule 10b-5. *Brennan* v. *Midwestern United Life Insurance Company*, 259 F. Supp. 673, 682-683 (N. D. Ind. 1966), and cases cited therein; *Geo. H. McFadden & Bro., Inc.* v. *Home-Stake Production Co.*, 295 F. Supp. 587 (N. D. Okla. 1968). Whether causation of these plaintiffs' injuries can be charged to Peltz, either alone or as part of a conspiracy, is a matter which must await trial for its resolution.

Defendants Morris and Eva Childs have also argued in support of their motion to dismiss that they are not sufficiently implicated by the charges made in the complaint. But they are charged with membership in the conspiracy, with transferring funds to other defendants to be used pursuant to an agreement to double the price of the stock, and with using funds borrowed from another defendant to purchase such securities. Whether the Childs were participants in the conspiracy, and whether these overt acts were innocent or culpable, are factual questions which cannot now be answered. The pleading as it stands, however, is sufficient to state a cause of action.

The First National Bank of Lincolnwood has moved to dismiss, contending that it cannot be held accountable for the criminal acts of its employees and directors. Along with the Bank, the chairman of its board of directors, two other directors and its president are also named as defendants. The Bank is named in the general conspiracy allegations of the complaint. Its officer and directors are charged with devising the scheme to inflate the price of Hercules Galion stock, and with taking various steps to implement it. The Bank is alleged to have loaned money to numerous principals in the conspiracy for the purpose of increasing the amount of trading in the securities.

Whether the Bank is chargeable as a principal participant in the conspiracy, whether it is liable on a theory of *respondeat superior* because of actual or apparent authority held by its employees and directors, or whether it will escape liability due to the nature of these individuals' alleged actions, are questions which involve the application of broad legal doctrines to the special facts of the case. See *Continental Baking Company* v. *United States*, 281 F. 2d 137, 149 (6th Cir. 1960); *Carroll* v. *First National Bank of Lincolnwood*, 413 F. 2d 353 (7th Cir. 1969); Fletcher, *Cyclopedia of the Law of Private Corporations* (1961), Vol. 10, p. 433; *Restatement of Agency Second*, § 219. The complaint on its face contains sufficient allegations to withstand the Bank's motion to dismiss.

Brokerage House Separate Defenses.

The court is grateful to the brokerage house defendants for presenting briefs, at its request, in support of their separate defenses. No motions are pending as to these issues. The court wishes only to point out that the questions of *respondeat superior* which are raised, and the questions relative to the extent of liability, if any, pursuant to the "controlling persons" provisions of the Securities Acts (section 15 of the 1933 Act and section 20(a) of the 1934 Act), are matters which must await further factual development for their resolution.

Conclusion.

For the reasons heretofore assigned, an order has been entered today dismissing count 2 in its entirety, dismissing plaintiffs Robter and Sandra Schaefer from the action, and denying all motions to dismiss in all other respects.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: July 28, 1970.

BLEED THROUGH

UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division.

* * (Caption—69-C-364) * *

DECISION ON MOTION OF DEFENDANT RODMAN & RENSHAW, INC.

The Defendant Rodman & Renshaw, Inc. has now filed a motion for judgment on the pleadings, having previously failed in its motion for summary judgment (order entered January 9, 1973). Although successive motions of this kind are to be discouraged for various reasons, these reasons do not require a preemptory denial of the motion. In this particular instance we find the motion to be well-founded.

The allegations of the Amended Complaint against this defendant are too conclusory to satisfy the specific pleading requirement of F. R. C. P. 9(b). *Segal* v. *Gordon*, 467 F. 2d 602 (2d Cir. 1972); *Robinson* v. *Caster*, 356 F. 2d 924, 927 (7th Cir. 1966). We can only assume that the plaintiffs, despite the lengthy history of this case, have no specific evidence of fraud or conspiracy against Rodman & Renshaw Inc. other than the acts of its departed employee Nagorsky. Fortuitously for Rodman & Renshaw, Nagorsky left more than three years before the Complaint was filed, and no concealment by Rodman & Renshaw is alleged.

We see no reason not to give retroactive effect to *Parrent* v. *Midwest Rug Mills Inc.*, 455 F. 2d 123 (7th Cir. 1972). The Illinois statute on which it is based was first enacted in 1953, and thus has been part of the Federal law since then, only recently declared. Therefore the requirements for non-retroactivity laid down by the Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971) have not been satisfied in the case at

bar. Cf. *Dasho* v. *Susquehanna Corp.*, 461 F. 2d 11, 21 (7th Cir. 1972), *cert. den.*, 92 S. Ct. 2496, 2498 (1972).

It Is Therefore Ordered, Adjudged and Decreed that the motion of defendant Rodman & Renshaw, Inc. for judgment on the pleadings is granted, and judgment is entered in its behalf on the First Amended Complaint, as amended.

Enter:

THOMAS R. MCMILLEN,
Judge, U. S. District Court.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Name of Presiding Judge, Honorable Thomas R. McMillen

Cause No. 69 C 364 Date September 13, 1973

Title of Cause Schaefer, et al. vs. First National Bank of Lincolnwood, et al.

Enter decision and order that the judgment entered on June 25, 1973 dismissing the Amended Complaint as to the American Stock Exchange, Rodman and Renshaw, Inc., John Risetto, Al Vernieri, Edward Crooks, Frank Alter, Charles Myers, Wilbur Gorman, Arthur Dickholtz, Jerry Fogelman and David Fogelman is final, pursuant to F. R. C. P. 54(b). (Draft)

Enter decision and order that plaintiffs' motion to adopt prior trial testimony of Arthur C. Keller is granted on the condition that the deposition actually be completed and upon the further condition that all objections to its admission into evidence at trial are reserved. (Draft)

BLEED THROUGH

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

* * (Caption—69-C-364) * *

DECISION ON MOTIONS TO CLARIFY PREVIOUS ORDERS AND TO MAKE ORDERS OF JUNE 25, 1973 FINAL AND APPEALABLE.

Plaintiffs have moved for a clarification of our two orders entered June 25, 1973 which dismissed the Amended Complaint as to certain defendants. Plaintiffs assert that there are irreconcilable differences between the two orders and that the status of the Amendment filed in 1972 is unclear. On the latter point, we ruled on June 25, 1973 that "the Amendment filed October 18, 1972 to the First Amended Complaint is stricken." That was intended to dispose of the Amendment as to all defendants added by it and needs no further elaboration.

Plaintiffs also contend that we ruled inconsistently on June 25, 1973 concerning the application of the statute of limitations to defendant Rodman & Renshaw and to the defendants added by the 1972 Amendment. In our order of January 9, 1973, Rodman & Renshaw was denied summary judgment on the ground of the 3-year limitation because the complaint contained allegations that a conspiracy continued until at least August 23, 1967, within three years of the filing of the original complaint. Aside from the alleged conspiracy, however, the statute had run as to Rodman & Renshaw when its participating employee Nagorsky departed in 1965, and it was not tolled by fraudulent concealment. In the subsequent order of June 25, Rodman & Renshaw was granted judgment on the pleadings on the ground that the conspiracy allegations failed to meet the requirements of F. R. C. P. 9(b).

Also on June 25, we dismissed as to the defendants added by the 1972 Amendment on the ground that plaintiffs had not exercised due diligence after 1967 to toll the running of the 3-year statute as to those defendants. Plaintiffs did not contend that the non-discovery doctrine, rather than the fraudulent concealment doctrine, tolled the statute as to Rodman & Renshaw. It was not raised in connection with the January 9 order, nor was it raised in the briefs preceding the June 25 order. The issue presented as to Rodman & Renshaw was fraudulent concealment and plaintiffs lost. Plaintiffs had an additional ten days after June 25, 1973 to take the next step and raise the legal issue of non-discovery. *Swam* v. *United States,* 327 F. 2d 431, 433 (7th Cir. 1965), *cert. denied,* 379 U. S. 852 (1964). However, they waived it when they delayed until filing the instant motion on July 17. If this appears to be an unreasonably strict approach, one need only look at the number of motions and orders filed in this case. Even complex litigation must be brought to an end someday.

We note in passing that we did not rule, as Rodman & Renshaw contends, that the non-discovery doctrine does not apply where derivative liability is alleged. We did not reach this point because it was not timely raised.

Plaintiffs finally contend that since they found out about the involvement of defendant Charles Myers from two depositions which could not have been taken before 1972, they have at least established their due diligence with respect to him. However, their lack of diligence in general has not been effectively contradicted; they did not show that they could not have found out about Myer's alleged participation through other available sources. Furthermore, this point could only have been raised under Rule 59(e) within ten days of June 25, 1973 and it was not.

Certain defendants dismissed out by the orders entered June 25, 1973 now move that there is no just reason to delay entering

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final judgments in their favor pursuant to F. R. C. P. 54(b). Plaintiffs have filed a conditional motion that, if we grant the defendants' motion, we make the same determination for all defendants dismissed out on that date. They object to defendants' motion, however, on the ground that it was untimely filed.

A strict thirty-day limit was invoked by the Seventh Circuit on plaintiffs' motion seeking a Rule 54(b) review at an earlier stage of this litigation. *Schaefer* v. *First National Bank of Lincolnwood*, 465 F. 2d 234 (7th Cir. 1972). The court ruled that the thirty day period can be extended only when there is "extreme hardship where dilatoriness is not occasioned by neglect or carelessness".

Plaintiffs object that defendants' motion was not formally filed until July 27, two days after the thirty-day limit. However, the motion was in fact brought to chambers and stamped "Received" on July 24. It was not stamped "Filed" until the date the parties appeared on the motion call, in accordance with the practice of our clerk's office. The motion was therefore not untimely made.

In the alternative, should it be considered on appeal that defendants are bound by the date on which the motion was officially stamped "filed," we find and conclude that the failure to meet the July 25 deadline was a clerical error or misunderstanding and was not caused by neglect or carelessness. Otherwise defendants would be required to deliver their motion to the clerk within less than 30 days in order to have it heard and filed within 30 days.

On its merits, the defendants' motion should be granted. They seek to end their involvement in this litigation by way of limitations and not on the merits. This case is now four and a half years old and may continue for an indefinite period before it is concluded at the trial level. In these circumstances, we see no just reason why the defendants whom we have found not to be involved in the merits should remain in suspense concerning

their ultimate liability or should be required to participate in any appeal involving the merits.

The plaintiffs' conditional motion for a Rule 54(b) order applicable to all defendants dismissed out by our orders of June 25 should also be granted. The non-moving defendants are in the same position as the movants, and an appeal from our orders, if any is taken, should cover all of these defendants.

It Is Therefore Ordered, Adjudged and Decreed that the judgment entered on June 25, 1973 dismissing the Amended Complaint as to the American Stock Exchange, Rodman and Renshaw, Inc., John Risetto, Al Vernieri, Edward Crooks, Frank Alter, Charles Myers, Wilbur Gorman, Arthur Dickholtz, Jerry Fogelman and David Fogelman is final, pursuant to F. R. C. P. 54(b).

Enter:

/s/ THOMAS R. MCMILLEN,
Judge, U. S. District Court.

Dated: September 13, 1973

BLEED THROUGH

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 73-2128

ROBERT SCHAEFER and SANDRA SCHAEFER,
Plaintiffs-Appellants,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 69 C 364
Thomas R. McMillen, Judge.

ARGUED SEPTEMBER 20, 1974—DECIDED JANUARY 30, 1975
Before CASTLE, *Senior Circuit Judge,* FAIRCHILD and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* Plaintiffs, private parties suing individually and as a class, appeal from unfavorable summary judgments and orders dismissing their complaint alleging common law fraud, violations of the Securities Acts and violations of the Sherman and Clayton Antitrust Acts.

The plaintiffs purchased Hercules-Galion Products, Inc. stock during a period of market manipulation between 1965 and 1967. They have based their civil claims on events which were grounds earlier for criminal prosecutions in the Southern District of New York. *United States* v. *Projansky, et al.,* 67 CR 729, *aff'd.* 465 F. 2d 123 (2d Cir. 1972). Named as defendants here were the criminal defendants and the non-indicted co-conspira-

tors of the *Projansky* case[1] and a number of additional non-criminal parties, including several brokerage houses and their salesmen and others. The defendants who are appellees in this appeal include the brokerage house of Rodman & Renshaw; the American Stock Exchange (AMEX) and a group of its specialists, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter; Charles F. Myers, the former president of Hercules-Galion Products, Inc.; Wilbur A. Gorman, chief operating officer of the brokerage house of Link, Gorman & Peck Co.; Arthur Dickholtz, an officer of the First National Bank of Lincolnwood; and Jerry and David Fogelson, partners in Investment Associates. These defendants successfully argued in the district court that the claims against them based on the Securities Acts were time barred and that the antitrust laws do not apply to securities market rigging schemes. Consequently, the district court dismissed the suit against them. These same contentions are at issue on appeal. We reverse in part and affirm in part.

I.

The original complaint in this action alleged substantially the same events as were alleged in the criminal indictment returned in New York. The original complaint sought relief from common law fraud; violations of section 1 of the Sherman Act (15 U. S. C. § 1), sections 1, 4, 5, 12 and 16 of the Clayton Act (15 U. S. C. §§ 12, 15, 16, 22 and 26); sections 15, 16, 17(a), and 22 of the Securities Act of 1933; (15 U. S. C. §§ 77o, 77p, 77g and 77v) and sections 9(a)(2), 10, 27 and 28 of the Securities Act of 1934 (15 U. S. C. §§ 78i, 78j, 78aa and 78bb).

1. These are Irving Projansky, Harry Brainin, Gerald Leavitt and Michael Geier, the four appellants in *United States* v. *Projansky*, and Arthur Keller, Stuart Projansky (Irving's son), Fred Weitz, Mark Rolland, Spero Furla, Murray Peltz, Burton Buddy Kozak, Harris Nagorsky, Herbert Werman, Edward Wetzel, Zafe Zafer, and David Zisfein. Named as co-conspirators but not as defendants were Morris and Eva Childs, George Georges, Irving Taub, the First National Bank of Lincolnwood, and Argus Capital Corporation. *United States* v. *Projansky*, 465 F. 2d 123, 124, n. 1 (2d Cir. 1972).

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In addition, however, to the sixteen criminal defendants and the six non-indicted co-conspirators, the plaintiffs named the seven brokerage houses employing some of the criminal conspirators. Among these was Rodman & Renshaw, the house which employed Harris Nagorsky, a Chicago broker who from the first figured prominently in the scheme, and Edward Wetzel. Rodman & Renshaw was generally charged in the original complaint with conspiring to defraud the plaintiffs. It was specifically charged with failing to supervise Nagorsky and thereby aiding and abetting the alleged conspiracy, fraud and stock manipulation. The plaintiffs broadened these claims in subsequent pleadings.

Briefly the facts are these.[2] Between July 1, 1965 and August 23, 1967, the sixteen criminal defendants conceived and executed a plan to manipulate the price of Hercules-Galion (Hercules) stock. By a furious promotion campaign, the group was able to raise the price of Hercules stock from $6 to over $14 per share. The heart of the scheme was for the defendants to regularly purchase from among themselves large blocks of Hercules stock on the AMEX at prearranged prices. The price was slowly raised by design, and as public interest and the price increased, the stock was sold and the profits taken.

After the criminal indictments were returned by a New York federal grand jury on August 23, 1967, the allegations were published immediately in many newspapers and news magazines. One and one-half years later, on February 19, 1969, the plaintiffs filed their original complaint. Of those now on appeal, only the defendant Rodman & Renshaw was named in the original complaint.

The first amended complaint was filed on July 25, 1969. Again, of the defendants here on appeal, only Rodman & Renshaw was named. Substantially the same allegations were repeated.

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2. For a complete history of the manipulation scheme consult the Second Circuit's recounting of the facts in *United States* v. *Projansky, supra* at 124-35.

In the fall of 1969, both the plaintiffs and the defendants made the several pretrial motions. The plaintiffs moved for discovery and the defendants sought dismissal of the action. Discovery of the criminal defendants was stayed until their criminal trial was completed. The antitrust claims against the defendants were dismissed. The district court held that the securities acts allegations and the common law fraud allegations stated claims for relief. The court, applying the Illinois five year statute of limitations for fraud, also found the securities acts claims timely.

Subsequently, two events took place setting the stage for this appeal. The first was the end of the criminal trial wherein all of the indicted conspirators were convicted. Discovery resumed and proceeded on schedule, first with the taking of the depositions of the individual criminal defendants followed by that of the brokerage houses representatives. On October 18, 1972, the plaintiffs filed their amendment to the first amended complaint adding as defendants the AMEX, the specialists, and Myers, Gorman, Dickholtz and the Fogelsons. The second event was this court's decision in *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F. 2d 123 (7th Cir. 1972). In *Parrent* we held that Rule 10b-5 actions were subject to the three year limitations period contained in the Illinois Securities Act.

At this point Rodman & Renshaw and all the defendants added in the newly amended complaint moved for summary judgment in the light of the shorter limitations period announced in *Parrent*. The district court then found the three year period applicable and ordered the dismissal of all three counts, including the securities and common law fraud claims and the antitrust claims which had been re-alleged. This order was made final under Rule 54(b), FED. R. CIV. P., and is the subject of this appeal. The plaintiffs contend that their suit against Rodman & Renshaw as well as all the other non-criminal defendants is timely, and that the district court erred in dismissing all their claims against the defendants.

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II.

Plaintiffs contended that they have an implied right of action under section 10(b) of the 1934 Act and Rule 10b-5 and under section 17 of the 1933 Act. The defendants contended that plaintiffs' sole relief lies under section 9 of the 1934 Act. The original complaint stated a claim for relief averring marketing manipulation of the price of Hercules stock. The defendants argued that section 9(a)(2) specifically prohibits the conduct which the complaint alleges. Arguing that a claim may not be duplicated within the framework of a single act in derogation of its specific limitations, the defendants concluded that the claims based on Rule 10b-5 and section 17 may not be raised in this case.

A.

Section 10(b) of the 1934 Act and Rule 10b-5 provide a private claim for relief from market manipulation.[3]

Section 10(b)[4] and Rule 10b-5[5] have been liberally construed by the Supreme Court and include private actions arising from

3. *See* 6 Loss, Securities Regulation 3869-73 (Supp. 2d ed. 1969); 3 Loss, Securities Regulation 1763 *et seq.* (2d ed. 1961). *Cf. Tcherepnin* v. *Knight*, 389 U. S. 332; *J. I. Case Co.* v. *Borak*, 377 U. S. 426; *Supt. of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971).

4. Section 10(b), 15 U. S. C. § 78j(b), provides:

> It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

5. Rule 10b-5, 17 C. F. R. 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(Footnote continued on next page)

manipulative stock transactions. In *Affiliated Ute Citizens* v. *United States,* 406 U. S. 128 (1971), the Court recognized a private right of action where the claim for relief based on Rule 10b-5 arose from a stock rigging scheme. By fraudulently mistating the prevailing market price of Ute Distribution Corporation stock, the defendant bankers artificially depressed its purchase price. Once they bought the stock, the defendants then sold it at its higher, true market value. Finding this practice unlawful, the Court remarked on the scope of section 10(b) and Rule 10b-5:

> These proscriptions, by statute and rule, are broad and, by repeated use of the word "any," are obviously meant to be inclusive. The Court has said that the 1934 Act and its companion legislative enactments embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC* v. *Capital Gains Research Bureau,* 375 U. S. 180, 186 (1963). In the case just cited the Court noted that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.,* at 195. This was recently said once again in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U. S. 6, 12 (1971). 406 U. S. at 151.

Similarly this Circuit has recognized a private implied right under 10b-5 where the defendant's conduct only threatened to create artificial market conditions. *Carroll* v. *First National Bank of Lincolnwood,* 413 F. 2d 353 (7th Cir. 1969).

The remedies provided by section 10(b) as well as the other sections of the securities acts are cumulative and not mutually

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(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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exclusive. In *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47 (7th Cir. 1968), this Circuit took what it called the "direct approach" in allowing a private plaintiff to bring an action under Rule 10b-5 although the conduct alleged fell squarely within either section 12 of the 1933 Act or section 15 of the 1934 Act. The defendants contended that the plaintiffs attempted to avoid the limitations period of specifically applicable sections of the securities acts by making their claims under section 10(b) and Rule 10b-5. The defendants went on to argue, as the defendants do here, that the specific sections were exclusive remedies.

Recalling the broad Congressional intent expressed in the language of section 10(b) and the serious remedial purposes of the Acts, the *Jordan* court concluded that the "remedies supplied by and under these acts are cumulative and not mutually exclusive." 401 F. 2d at 51. By this same approach, the remedies afforded by section 9(a)(2) are not, as the defendants contend, the plaintiffs' sole remedy for market manipulation. The plaintiffs may make their claim for relief under Rule 10b-5 even though the alleged market rigging scheme also falls squarely within section 9(a)(2). Their remedies are cumulative. They may make their claim for relief under either or both or several sections of the acts.

In two cases the Securities and Exchange Commission found a series of stock transactions resulting in an artificial market to be violative of both Rule 10b-5 and section 9(a)(2). In *Adams & Co.*, 33 SEC 444 (1952), the Commission revoked the registration of two broker dealers when they conspired with a third person to raise the price of Mohawk Distillery stock by fraudulently creating apparent activity in the stock on the Chicago Board of Trade. The parties falsified records, reported false bids and offers and engaged in a series of prearranged sales and purchases at increasingly higher prices, causing the price of the stock to become artificially inflated. The Commission found

simultaneous violations of sections 10(b), 17(a), 9(a)(2) and Rule 10b-5. In *Thornton & Co.*, 28 SEC 208 (1948), *aff'd sub nom. Thornton* v. *Securities and Exchange Commission*, 171 F. 2d 702 (2d Cir. 1948), these sections were all found applicable to a single scheme of market manipulation. The facts which supported a section 9(a)(2) claim also gave rise to an equally valid Rule 10b-5 claim. We will leave it to the private plaintiff to make his claims under either Rule 10b-5 or 9(a)(2) or both. The allegations of the pleadings in the case contain elements of both. The Rule 10b-5 claim is therefore appropriate.

B.

The defendants have attacked the sufficiency of plaintiffs' section 17 claim on the grounds that (1) no right of action can be implied under section 17 and (2) the parties are not in privity. The defendants' argument has assumed that plaintiffs' Rule 10b-5 claim will be dismissed leaving section 17 to stand alone.

While there is authority in this Circuit for sustaining an implied right of action under section 17 alone,[6] we need not deal directly with this issue. There is an implied right of action under section 10(b) and Rule 10b-5. Judge Friendly's concurrence in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2d Cir. 1968), *cert. denied, sub nom. Coates* v. *SEC*, 394 U. S. 976 (1968), often cited for denying implication, acknowledged that:

> Once it had been established . . . that an aggrieved buyer has a private action under § 10(b) of the 1934 Act, there seemed little practical point in denying the existence of such an action under § 17—with the important proviso that fraud, as distinct from mere negligence, must be

6. *Surowitz* v. *Hilton Hotels Corporation*, 342 F. 2d 596, 604 (7th Cir. 1965), *rev'd on other grounds*, 383 U. S. 363 (1966). *But compare Reid* v. *Mann*, 381 F. Supp. 525 (N. D. Ill. 1974), and authorities cited there.

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alleged. See Fischman v. Raytheon Mfg. Corp., 188 F. 2d 783, 787 n. 2 (2 Cir. 1951); Weber v. C. M. P. Corp., 242 F. Supp. 321, 322-325 (S. D. N. Y. 1965) (Wyatt, J.); Thiele v. Shields, 131 F. Supp. 416, 419 (S. D. N. Y. 1955) (Kaufman, J.). 401 F. 2d at 867.[7]

Since fraud as well as negligence has been alleged and the section 10(b) claim established, plaintiffs' section 17 claim will be allowed to stand.

Similarly, we need not deal with defendants' contention that section 17 has a privity requirement. Where section 17 has been concurrently pleaded with a sufficient Rule 10b-5 claim, as here, courts forbear to rule on the sufficiency of the section 17 claim. 6 Loss, SECURITIES REGULATION 3913 (Supp. 2d ed. 1969).

III.

Every defendant appealing here has contended that the statutory period within which to bring a Rule 10b-5 action is three years. Each has further contended that this period expired before the plaintiffs filed their various complaints. Since the defendants stand in different factual circumstances, they must be dealt with separately.

This Circuit determined in *Parrent* v. *Midwest Rug Mills*, 455 F. 2d 123 (7th Cir. 1972), that Rule 10b-5 and section 17 actions arising in Illinois were subject to a three year statute of limitations. Since no federal provision limits Rule 10b-5 actions, the *Parrent* court looked to the law of the forum state, Illinois, for the statute of limitations which best effectuated the policies of Rule 10b-5 and section 17. This was held to be the three year limitation found in section 13 of the Illinois Security Law.

The plaintiffs contend that Illinois' five year statute of limitations for fraud applies. Judge Decker applied this limitation at an earlier stage in this litigation before the *Parrent* case was

7. *See also Dauphin Corp.* v. *Redwall Corp.*, 201 F. Supp. 466, 469 (D. Del. 1962).

decided. Subsequently Judge McMillen, succeeding Judge Decker in this action, found the three year limitation applicable on the basis of *Parrent*. The plaintiffs urged that the five year limitation is "the law of the case." They also argued that *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), precluded retrospective application of *Parrent*.

The doctrine of the law of the case did not bind Judge McMillen to apply the five year limitations period. Federal rule of the case doctrine is a rule of practice. It does not limit a court's power. *Messenger* v. *Anderson*, 225 U. S. 316, 319 (1922); *Drinan* v. *A. J. Lindermann & Hoverson Co.*, 238 F. 2d 72, 74 (7th Cir. 1956). A district judge has the power to undo the work of his predecessor in the same action. *Bowles* v. *Wilke*, 175 F. 2d 35 (7th Cir. 1949).[8]

Although the parties there did not raise the issue of retroactivity, we applied *Parrent* retroactively in *Hupp* v. *Gray*, 500 F. 2d 993 (7th Cir. 1974). Under *Chevron, supra*, the doctrine of nonretroactivity is applied when those invoking it receive favorable consideration on three separate factors. As set out by the Supreme Court these are:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe* v. *United Shoe Machinery Corp., supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections, supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

8. The rule of the law of the case may have a different effect upon a federal court in a diversity case where a state court has previously acted. *Barrett* v. *Baylor*, 457 F. 2d 119, 123-24 (7th Cir. 1972).

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> *Linkletter* v. *Walker, supra,* at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* at 706. *Chevron* v. *Huson,* 404 U. S. at 106-07.

The first factor for consideration is decisive. Although the statute of limitations issue was one of first impression in *Parrent,* the *Parrent* court did not overrule "clear past precedent." The court said:

> It is clear that under the resemblance test the three year limitation in Section 13, subd. D of the Illinois Securities Law (Ill. Rev. Stat. ch. 121½, § 137.13, subd. D) applies to the 10b-5 actions stated in Counts I and II.
>
> The three year limitation is . . . closer to the express limitation periods in the various sections of the federal act . . . . Furthermore, logic dictates selection of the three year Illinois limitation as tending more toward an orderly development of law, than reaching into a different Illinois Act (Ill. Rev. Stat. ch. 83 § 16) for the appropriate limitation. 455 F.2d at 127.

Before *Parrent,* circuit courts forced to choose between a state's fraud or Blue Sky statute of limitation used the "resemblance test." *Charney* v. *Thomas,* 372 F. 2d 97 (6th Cir. 1967); *Vanderboom* v. *Sexton,* 422 F. 2d 1233 (8th Cir.), *cert. denied,* 400 U. S. 852 (1970). They looked to the limitations period of the state action which was most like section 10(b) or Rule 10b-5. Ruder, *Limitations on Civil Liability Under Rule 10b-5,* 1972 DUKE L. J. 1125, 1142-50 (1972); Note, *Parrent* v. *Midwest Rug Mills, Inc.: Statute of Limitations Under Section 10(b),* 68 NW. U. L. REV. 162 (1973).

It is apparent from a reading of section 12 of the Illinois Securities Law (Ill. Rev. Stat., ch. 121½, 137.12), for which section 13 supplies the three year limitation, that it closely

parallels Rule 10b-5 and a study of the Illinois Securities Laws reveals a nearly identical aim. *Parrent, supra* at 127. Circuits which do not apply Blue Sky limitations either have higher standards for proof of scienter or dissimilar state securities statutes. Martin, *Statute of Limitations in 10b-5 Actions: Which State Statute is Applicable?* 29 BUS. L. 443 (1974). Clearly, application of the Illinois Blue Sky limitations period was foreshadowed, and in any event *Parrent* did not constitute an overruling of any clear past precedent of the Seventh Circuit.

Furthermore, following the rule in *Parrent* is not detrimental to the operation of Rule 10b-5 in this case inasmuch as the plaintiffs may and do call upon the mitigating doctrine of tolling. Equitable tolling is always available where fraud has concealed the wrong done. See part IV, *infra.* Since *Chevron* does not operate here, *Parrent's* three year limitations period applies retroactively.

IV.

The defendants have challenged the plaintiffs' reliance on the theory of equitable tolling on two grounds: (1) that tolling does not apply to claims based on negligence and (2) that the allegations of the complaints are insufficient to toll the limitations period.

A.

Rodman & Renshaw, named a defendant along with six other brokerage houses in the original complaint of February 19, 1969, had employed Harris Nagorsky, one of the parties indicted in Aguust 1967. During the period he was with Rodman, Nagorsky participated in the planning of the manipulation scheme, but he left in October 1965 before the scheme had run its course. Rodman contended that the limitations period ran from the time Nagorsky left its employ. This would mean that the original complaint was time barred by more than three months. The plaintiffs, however, claimed that the

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limitations period began to run in 1967. They argued that the period between 1965 and 1967 was tolled and that the statute of limitations did not begin to run until the alleged fraud was discovered when the New York indictment was returned.

Federal courts have long recognized the theory of equitable tolling in fraud actions. Clearly, it is available to claimants in Rule 10b-5 actions. In *Parrent* the court said:

> We must read into the three year limitation applied in the Rule 10b-5 count the "equitable doctrine" that the statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part . . . ." 455 F.2d at 128.

In *Hochfelder* v. *Midwest Stock Exchange*, 503 F. 2d 364, 375 (7th Cir. 1974), Chief Judge Swygert said:

> The equitable tolling doctrine provides that where a fraud which is the foundation of the suit has actively been concealed or is of such a nature as to conceal itself, the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud or in the exercise of due care should have obtained knowledge of the fraud. *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 396 (1945); *Morgan* v. *Koch*, 419 F.2d 993, 997 (7th Cir. 1969).

The federal tolling doctrine operates both against those who commit the alleged fraudulent acts and those who *negligently facilitate fraud*. The defendants have claimed that the tolling doctrine only operates against those who commit the fraud. They sought to find support in *Bryan* v. *United States*, 99 F. 2d 549, 552 (10th Cir. 1938), *cert. denied*, 305 U. S. 661 (1939), and *Hayden* v. *Thompson*, 71 F. 60 (8th Cir. 1895), both fraud actions. *Bryan* is no support because the fraud suit was dismissed upon the defense of sovereign immunity where the defendant employer was the United States Government Application of the tolling doctrine to a *negligent employer* was not an issue. Neither does *Hayden* lend any support to the defendants'

argument. In *Hayden,* the plaintiff, a customer, sued to recover fraudulently distributed dividends from a bank, its directors and shareholders. The court held that equitable tolling did not apply to one of the bank's shareholders since neither a fraud nor a negligence claim had been alleged against him. The plaintiff's claims against the other shareholders and the directors were held to be timely on the theory of equitable tolling.

Equitable tolling embraces defendants such as Rodman & Renshaw *who have facilitated by their negligence a Rule 10b-5 fraud.* Chief Judge Swygert continued in *Hochfelder* v. *Midwest Stock Exchange, supra at* 375-76:

> If claims brought in the same posture as the instant action—asserting charges amounting to negligence but short of fraud—are to have any vitality, it cannot be contended that the tolling doctrine should not apply. Often the underlying fraud, carefully concealed in and of itself, would cloak the implementing actions of others. Accordingly, where the acts of a defendant facilitate the perpetration of a concealed fraud of another, the bar of the statute of limitations should not begin to run until a plaintiff obtains knowledge or through due diligence should have obtained knowledge of the underlying fraud.

This passage was cited approvingly in *Hochfelder* v. *Ernst & Ernst,* 503 F. 2d 1100, 1119 (7th Cir. 1974), where equitable tolling was held to operate against the accounting firm of Ernst & Ernst for negligent facilitation and implementation of fraud although that firm was not chargeable with acts of fraud or fraudulent concealment.

Clearly, the action of Rodman & Renshaw fell within the ambit of equitable tolling. In their original claim for relief the plaintiffs alleged direct participation in the conspiracy to manipulate the price of Hercules stock as well as negligent facilitation. Even as equitable tolling works to prevent the defrauder from taking advantage of his wrongdoing, it also works to prevent the negligent person from taking advantage of his carelessness.

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B.

The plaintiffs' allegation of fraudulent concealment is sufficiently specific to support a request for equitable tolling. The defendants contended that the plaintiffs merely alleged their ignorance of the fraud. They claimed that the plaintiffs must allege their own diligence as well.

When pleading Rule 10b-5 fraud, plaintiffs must comply with Rule 9(b), FED R. CIV. P.[9] Once the underlying fraudulent practices are correctly pleaded, plaintiffs may then avail themselves of equitable tolling. The allegations of the pleadings here stated with particularity the circumstances of the conspiracy to defraud the purchasers of Hercules stock through market rigging. They were drawn primarily from the lengthy criminal indictment and were a detailed basis from which to claim fraudulent concealment. In paragraph 27 of the original complaint, the plaintiffs first alleged under the heading "Fraudulent Concealment" their own ignorance of the fraud until its discovery in 1967. They then stated:

> Plaintiffs and members of the class could not have discovered the combination, conspiracy, and other fraudulent acts at an earlier date by the exercise of due diligence since the combination, conspiracy, and fraudulent acts set forth herein had been fraudulently concealed by the defendants by various means and methods used to avoid the detection thereof.

In paragraph 25 of the first amended complaint they added:

> [T]he action is brought within one year after the discovery of the untrue statements and omissions of material facts alleged herein, and within one year after such discovery should have been made by the exercise of reasonable diligence. . . .

---

9. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be pleaded with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Furthermore, throughout the pleadings plaintiffs gave details of the active, continuous concealment of the fraud and have supported with discovery testimony their diligence.

Clearly the plaintiffs have alleged all the necessary elements of fraudulent concealment. In *Baker* v. *F&F Investment,* 420 F. 2d 1191 (7th Cir. 1970), the court laid down the proper test:

> In order to obtain the shelter of the federal doctrine of fraudulent concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. 420 F.2d at 1199.

The plaintiffs have expressly alleged that they did not know of Rodman & Renshaw's involvement until the criminal indictment in *United States* v. *Projansky, supra,* was returned in August 1967. All of the plaintiffs deposed testified that they first learned of the rigging scheme either upon the publication given to the indictment or later from friends or their attorneys. The plaintiffs also alleged and deposed that the criminal conspirators concealed the fraud from them. There is ample discovery testimony showing that the conspirators gave the plaintiffs with whom they directly dealt misleading information, hiding from them at all times the true nature of their stock transactions. This testimony also stands uncontradicted. Finally by implication as well as expressly, the plaintiffs have alleged that their delayed discovery of the fraud was not their fault. A complaint when tested by summary procedures must be given the benefit of every possible implication. *United States* v. *Crown Zellerbach Corp.,* 141 F. Supp. 118 (N. D. Ill. 1956).

The discovery testimony of Robert Schaefer supported his claims. During the fall of 1965, he repeatedly telephoned Nagorsky and defendant Epstein and questioned them concerning the value and future of Hercules stock. The defendants have not put Schaefer's testimony into question.

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Nor did the plaintiffs realize that Myers, Gorman and the Fogelsons might be participants in the manipulation scheme until 1972. These defendants were not indicted nor mentioned in the criminal indictment. In no way could the plaintiffs have known the part these defendants played until they had deposed the criminal defendants. Since discovery of the indicted conspirators was stayed until after their criminal trial, the plaintiffs were first able to take their testimony in the latter months of 1971. They did so promptly. By deposing Spero Furla, the plaintiffs learned of the meeting between five of the conspirators and Charles Myers, the president of Hercules-Galion, at the Hercules plant in the fall of 1965 after the market rigging plan had been put into operation. They also found that Myers was fully aware of the manipulation. By deposing Buddy Kozak, the plaintiffs learned of his activities while an employee of Link, Gorman & Peck and his relationship to its chief operating officer, Wilbur Gorman. By deposing Mark Rolland, they learned of David Fogelson's involvement.

In brief, the plaintiff's Rule 10b-5 claims against Rodman & Renshaw, Myers, Gorman, Dickholtz and the Fogelsons are timely.[10] The complaint as amended alleged with particularity the conspiracy to manipulate Hercules stock and stated all the necessary elements of defendants' fraudulent concealment. Equitable tolling must apply. The plaintiffs discovered the existence of the fraud in August 1967. The three year limitations period commenced running then for Rodman & Renshaw. One and one-half years later, in February 1969, the original complaint was filed naming Rodman & Renshaw among other brokerage houses. The plaintiffs discovered the roles which Myers, Gorman, Dickholtz and the Fogelsons played between November 1971 and March 1972. The limitations period then began running for these defendants. Less than a year later, in October 1972, the

10. The record is not clear as to whether Dickholtz and the Fogelsons were parties to the original order of dismissal dated June 25, 1973, but the district court expressly included them in the "clarification" order of September 13, 1973.

plaintiffs amended the complaint and added their names as parties-defendant.

The district court's orders granting judgment on the pleadings to defendant Rodman & Renshaw and summary judgment to defendants Myers, Gorman, Dickholtz and the Fogelsons are reversed. The district court will have jurisdiction over the pendent common law fraud claims. *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966).

C.

Plaintiff's action against the American Stock Exchange and its specialists is time barred. These defendants were first named in the amendment to the first amended complaint which was filed three and one-half years after the original complaint and more than five years after the criminal indictments. The plaintiffs contend that the AMEX and its specialists aided and abetted the manipulation scheme through lack of proper supervision.

The plaintiffs argued that they could only have discovered the AMEX's negligence after taking the following depositions from the brokerage houses:

> (1) Deposition of Defendant Hertz-Warner & Co. per Irving Hertz 6/27/72 pp. 19 et seq; and Henry Warner 6/27/72 pp. 83 et seq.
>
> (2) Deposition of Defendant Edward Wetzel 5/25/72, pp. 81 se seq. [sic.].
>
> (3) Deposition of Defendant Reynolds & Co., per Anthony H. Englese 6/29/72 pp. 53 et seq.
>
> (4) Deposition of Defendant Hornblower & Weeks, Hemphill, Noyes per William J. Lawlor, Jr. 8/1/72 pp. 59-61.
>
> (5) Deposition of Defendant Link, Gorman & Peck per Wilbur A. Gorman 8/15/72 p. 21 and per June E. Carlson 7/6/72 pp. 69, 70. (Plaintiffs' Brief, p. 26.)

These depositions were taken after the criminal trial and after the plaintiffs had first deposed the criminal defendants. This

discovery sequence, the plaintiffs believed, gave them a strategical advantage over the brokerage houses. Once the brokerage houses were deposed, the plaintiffs added the AMEX and its specialists to their list of defendants in October 1972.

The plaintiffs delayed discovery of the brokerage houses for too long. The criminal indictment stated that the criminal defendants were certified to trade securities on the AMEX, that they manipulated a stock registered with the AMEX, and that the manipulation took place on the floor of the Exchange itself. Also, the plaintiffs could have preliminarily deposed the brokerage houses on the behavior of the AMEX before the criminal trial. All of the depositions which the plaintiffs list above as essential to discovering the role which the AMEX and its specialists played during the stock rigging (except that of Wetzel) could have been taken before the criminal trial. The stay of discovery order was directed only to the indicted conspirators. Finally, gaining a strategical advantage is not a sufficient reason for delaying five years before naming these defendants. The sum of information the plaintiffs had concerning the AMEX before taking discovery of the brokerage houses was not increased by the 1971 and 1972 depositions. The three year limitations period had expired. The amendment to the first amended complaint came too late insofar as the AMEX and its specialists, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter, were concerned.

The order of the district court granting summary judgment to the AMEX and its specialists must be affirmed.

V.

The district court properly dismissed the plaintiff's antitrust claims. At the start of this action the plaintiffs included a claim under section 1 of the Sherman Act, 15 U. S. C. § 1. Judge Decker dismissed it against the original brokerage house and criminal defendants. *Schaefer* v. *First National Bank of Lincolnwood,* 326 F. Supp. 1186 (N. D. Ill. 1970). Subsequently, on

the basis of Judge Decker's opinion, Judge McMillen dismissed it against the non-criminal defendants.

The plaintiffs contended that the conspiracy to create and maintain an artificial trading price for Hercules stock on the AMEX was price fixing and a per se violation of the Sherman Act prohibition against conspiracies and combination to fix and maintain the price of goods in interstate commerce. The plaintiffs argued that the district court should not have dismissed the antitrust claims because the defendants' manipulatory practices fall within the literal language of the Sherman Act.

Securities exchanges do not enjoy a blanket exemption from the antitrust laws. In *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963), the Supreme Court held that the antitrust laws do apply to exchanges and made such an assumption the starting point for any analysis of a conflict arising from their collision with the securities laws. The Court said at 357:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.,* 308 U. S. 188, 198; see *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456-457; *California* v. *Federal Power Comm'n,* 369 U. S. 482, 485. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

In fact, the antitrust laws are a necessary complement to the regulatory scheme of the securities acts. As the *Silver* Court said:

> Since the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly

> appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. 373 U. S. at 359.

Although the *Silver* case was distinguished, its further operation was seriously questioned by the Supreme Court's opinion in *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289 (1973), holding that an antitrust action against a commodity exchange should be stayed to afford the Commodity Exchange Commission an opportunity to determine if the challenged conduct of the exchange was in compliance with the applicable statute and with exchange rules. *See also Chicago Mercantile Exchange* v. *Deaktor,* 414 U. S. 113 (1973).

Private parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review. In *Silver,* the Court allowed a private antitrust suit because the Securities and Exchange Commission was not granted any statutory means under the securities acts for reviewing a New York Stock Exchange order terminating direct wire telephone connections with non-members. The Court added in a footnote (358, n. 12) that "[w]ere there Commission jurisdiction *and ensuing judicial review* for scrutiny of a particular exchange ruling. . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity. . . ." (emphasis added).

The plaintiffs here have a forum for review unlike the plaintiffs in *Silver.* The plaintiffs have chosen to make claims both under section 10(b) and section 17 of the securities acts and under the antitrust laws.

By electing to make their claim for relief under the securities acts, the plaintiffs have rendered their antitrust claims superfluous. The sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts. 3 Loss, Securities Regulation 1529-70 (2d

ed. 1961). The plaintiffs' Sherman and Clayton antitrust claims are dismissed for these reasons and for those appearing in Judge Decker's opinion, 326 F. Supp. 1186, 1190-92.

In summary, (1) we affirm the district court's dismissal of Count II (antitrust claims) as to all parties; (2) we affirm the district court's dismissal of Counts I (securities acts claims) and Count III (common law fraud claims) as to the American Stock Exchange, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter; but we reverse the court's dismissal of Counts I and III as to all other defendants. The case is remanded for further proceedings consistent herewith.

REVERSED IN PART;
AFFIRMED IN PART;
AND REMANDED.

FAIRCHILD, *Circuit Judge*, concurring. I agree in almost all respects with the opinion ably written for the court by Judge Sprecher. With respect to Part V (dismissal of the antitrust claims), the most persuasive argument seems to me to arise out of the contrast between the relevant language of the Securities Exchange Act and that of the antitrust laws. Although it is arguable whether or not, before the enactment of the Securities Exchange Act, the manipulation specifically described in § 9(a)(2), 15 U. S. C. § 78i, fell within the far more general language of § 1 of the Sherman Act, 15 U. S. C. § 1, the later enactment not only specifically described the activity (expressly including acting "with one or more other persons," as well as "alone") and declared it unlawful, but in § 28(a), 15 U. S. C. § 78bb(a), very closely limited the recovery for violation, i.e., actual damages under the Securities Exchange Act, contrasted with treble damages under the antitrust laws, 15 U. S. C. § 15. Under all the circumstances, it seems to me the more logical conclusion that the later enactment was either an implied amendment of the earlier, or was itself recognition by Congress that the activity described in § 9(a)(2) of the Securities Exchange Act had not previously been prohibited by the antitrust laws.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 4, 1975.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

ROBERT SCHAEFER, ET AL.,
Plaintiffs-Appellants,

No. 73-2128 *vs.*

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 69 C 364

ORDER.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, the panel having voted to deny the petition for rehearing, and a majority of the active members of the court having voted to deny a rehearing *en banc*,

It Is Ordered that the petition for rehearing and suggestion that it be reheard *en banc* be, and the same are hereby, Denied.

Judge Philip W. Tone disqualified himself from consideration of the petition for rehearing *en banc*.

APPENDIX B.

STATUTORY APPENDIX.

SECURITIES ACT OF 1933.

Section 12–Civil Liabilities Arising in Connection with Prospectuses and Communications:

(15 USCA § 77(1))

Any person who–

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

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Section 13—Limitation of Actions.

(15 U. S. C. A. § 77m)

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

Section 17—Fraudulent Interstate Transactions.

(15 U. S. C. A. § 77q)

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ and device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in in-

terstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

SECURITIES EXCHANGE ACT OF 1934.

Section 9(a)(2)—Manipulation of Security Prices.

(15 U. S. C. A. § 78i(a)(2))

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

Section 9(e)—Manipulation of Security Prices.

(15 U. S. C. A. § 78i(e))

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or trans-

action, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorney's fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 10—Manipulative and Deceptive Devices.

(15 U. S. C. A. § 78j)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

General Rules and Regulations Under the Securities Exchange Act of 1934.

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Illinois Securities Law of 1953.

Section 137.13D—Civil Remedies.

(Chapter 121½, Ill. Rev. Stats.)

No action shall be brought for relief under this Section or upon or because of any of the matters for which relief is granted by this Section after three years from the date of sale.

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No. 74-1407

In the
Supreme Court of the United States
October Term, 1974

RODMAN & RENSHAW,
Petitioner,

vs.

ROBERT AND SANDRA SCHAEFER, et al.,
Respondents.

OPPOSITION TO PETITION OF RODMAN AND RENSHAW FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Section 10(b), Rule 10B-5 (15 USC, Section 78j(b) 2-12

Section 20 (15 USC, Section 78c) 10

Securities Act of 1933

Section 17, (15 USC, Section 77q) 2, 9

Rules

Supreme Court, Rules of Practice on Appeal

Rule 19(b) 5, 6, 12

BLEED THROUGH

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1407

RODMAN & RENSHAW,

Petitioner,

vs.

ROBERT AND SANDRA SCHAEFER, et al.,

Respondents.

OPPOSITION TO PETITION OF RODMAN AND RENSHAW FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Robert and Sandra Schaefer, et al., and members of the class they represent, oppose the petition of Rodman & Renshaw, for a writ of certiorari to review the decision and judgment of the court of appeals for the Seventh Circuit of January 30, 1975 on the issues presented by petitioner. Respondents in this petition have filed their own petition to review another distinct and separate part of said decision of that court under No. 74-1366.

QUESTIONS PRESENTED

Respondents cannot, for the most part, accept the delineation of issues in the petition as presented by petitioner, Rodman & Renshaw (Rodman).

(1) Rodman states the first and primary issue in their petition as

> 1. Whether a cause of action for damages for manipulation of prices of shares of stock listed on a national exchange for which a specific damage remedy is available under § 9 of the Securities Exchange Act of 1934 may also be implied under §10 (b) of that Act and Rule 10(b)(5) of the Securities Commission *where the action would be time barred by the limitations period of §9(e) of the Act?* (emphasis supplied by respondents)

Referring to the emphasized portion, there is nothing in the record of this case through the court of appeals to indicate if respondents' claims based on the stock manipulation were denied under Section 10 (b), Rule 10B-5 of the 1934 act and restricted to Section 9 that the claim against Rodman would be *ipso facto* time barred by the Section 9(e) limitations. The rulings in the district court and most recently in the Seventh Circuit have consistently upheld respondents' claim under Section 10(b). Accordingly, the application of the Section 9 limitations period to any of the alleged manipulation conspiracy defendants has never been decided and hardly argued. A fair statement of the Question No. 1 as presented in Rodman's petition would therefore be as follows:

> 1. Whether a claim for relief based on an alleged fraudulent manipulation of a security on a national securities exchange may be brought by purchasers under Section 10(b), Rule 10B-5 as well as under Section 9?

(2) Rodman's petition states the second question as:

> 2. Whether any private right of action for damages may be implied under § 17 of the Securities Act of 1933 and whether if such a right is implied, a privity requirement exists as a predicate to its maintenance?

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Respondents do not contest the wording of this question in the abstract but state that this question was not part of the decision and judgment of the Seventh Circuit and therefore is nothing for this court to review.

Accordingly, Rodman's Question No. 2 ought to be eliminated.

(3) Rodman's petition states the third question as follows:

> 3. Whether, if the limitations period of the forum state is to be applied, the period should be tolled as to defendant *whose liability is derivative and vicarious and is not predicated upon complicity in the fraudulent scheme but upon negligence facilitating the fraud?* (emphasis supplied by respondents)

This statement of Question No. 3 is erroneous because it mis-states the primary basis of respondents' claim against the brokerage firm, Rodman & Renshaw. The emphasized portion assumes that the claim is based primarily on fraud through the conduct of employe and customer's representative, Harris Nagorsky and principals of the firm.

There is therefore no issue in the record of this cause based on pure negligent conduct of Rodman as their Question No. 3 assumes. Said Question No. 3 should therefore be eliminated.

(4) Rodman's petition states the fourth and last question as follows:

> 4. Whether, if either of such actions may be implied the limitations periods of such Securities Acts should be applied and not the limitations period of the forum state?

Respondents believe that Question No. 4 is spurious in the context of this cause as amplified in the argument portion of this brief.

STATEMENT OF THE CASE

As Rodman's petition acknowledges, plaintiffs' claim against Rodman & Renshaw, the brokerage firm, is based primarily on the admitted and uncontested fraudulent stock manipulation activities of Rodman's employe, Harris Nagorsky, in the course of his employment as a customer's representative with the firm.

At the alleged beginning of the conspiracy to manipulate in July of 1965, Nagorsky was employed in that capacity by Rodman. The record has shown and is not disputed that Nagorsky remained in the employment of Rodman until sometime in the first or second weeks of October of that year. Soon thereafter Nagorsky obtained employment with another Chicago brokerage firm, First Hanover Corporation and continued his manipulation activities with that firm, also a defendant in this cause, into the year 1966. Thus, Nagorsky's activities were hardly limited to "only three weeks" as mis-stated in Rodman's petition.

Respondents also challenge Rodman's statement on page three of the petition that the bulk of the facts alleged in the detailed account of the manipulation in respondents' amended complaint did not involve them or other brokerage house defendants. To the contrary, the heart of the allegations centered around the activities of various customers' representatives including Harris Nagorsky who were conducting the manipulation in the course of their employment and through the facilities of their respective brokerage firms. The conduct of these individual manipulators was the conduct of their respective firms and a

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source of earnings at least in the form of commissions for those firms.

REASONS FOR GRANTING THE WRIT

Respondents disagree with each and every reason cited by petitioner as grounds for granting the Writ of Certiorari, as will be amplified in the argument.

Overall, and in summary, respondents find none of the grounds stated in Rule 19(b) of the rules of this court present in the portion of the decision of the Seventh Circuit offered by Rodman's petition for review.

ARGUMENT

I.

A FRAUDULENT STOCK MANIPULATION IS ACTIONABLE UNDER SECTION 10(b), RULE 10B-5 AS WELL AS SECTION 9 AND WITHIN THE EXTENT OF 10(b) ACTIONS STATED BY THIS COURT. NO CONFLICT EXISTS ON THIS QUESTION IN ANY OF THE CIRCUIT COURTS OF APPEAL.

To respondents' knowledge, there is not a single decision of any circuit court of appeals in the federal circuits that conflicts with the decision of the Seventh Circuit below that a civil action for damages based on a stock fraud manipulation is actionable under Section 10(b), Rule 10B-5 of the Securities and Exchange Act of 1934. Petitioners have cited none to this court, neither did they cite any in the arguments to the Seventh Circuit and to the district court. The latter was had in late 1969 and early 1970 resulting in the decision *Schaefer, et al.* v. *First National Bank of Lincolnwood, et al.*, 326 F.Supp. 1186 (Pet's. App. at pp. A-1, A-12).

Neither does the decision below conflict with any decision of this court. In fact, actionability of stock manipulation under Section 10(b) falls squarely within the guidelines announced by this court in related decisions. Furthermore, the question is not unique. Thus, none of the reasons stated in Rule 19(b) apply to make it either necessary or even advisable that this court grant the writ.

This court has stated on a number of occasions that the civil remedial provisions of the Securities Exchange

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Act of 1934 are to be given a broad, non-restrictive and flexible construction to achieve the remedial purposes of the law. In a recent decision, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 31 L.Ed. 2d 741, 92 S.Ct. 1456 citing *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 186, this court said:

> In the case just cited the Court noted that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes'.

In *Superintendent of Insurance* v. *Bankers Life and Casualty Company, et al.*, 404 U.S. 6, 30 L.Ed. 2d 128, 92 S.Ct. 165 (1971), this court emphatically defined the remedial extent of Section 10(b) as including any sale of a security in connection with fraud.

> Section 10(b) outlaws the use 'in connection with the purchase or sale' of any security of' any manipulative or deceptive device or contrivance.
>
> (30 L.Ed. 2d at pp 132, 133)

and further:

> Section 10(b) must be read flexibly, not technically and restrictively. Since there was a 'sale' of a security and since fraud was used 'in connection with' it, there is redress under § 10(b), whatever might be available as a remedy under state law.
>
> (30 L.Ed. 2d at page 134)

The first question in Rodman's petition in pure and simple contradiction of the above seeks to remove from respondents alternatives under the securities acts a remedy that falls within express language of Section 10(b). In short, petitioner argues for the identical restrictions, inflexibility and technical interpretation this court has so plainly disavowed.

The Seventh Circuit, in permitting plaintiffs' claim to stand under Section 10(b) as well as Section 9, has merely followed in addition to the express language of 10(b), Rule 10B-5, this court's guidelines for interpreting the 1934 act and, in particular, the anti-fraud provisions of Section 10(b). Furthermore, it followed its own prior decisions which stand as the law in this circuit and those of other circuits where we know of no dissent. The key words in the decision below on this issue are that remedies under the 1934 act are "cumulative and not mutually exclusive." (Pet's. App. pp A-24, 25). The Seventh Circuit thereby embraced the basic principle of flexibility in interpreting the statute that this court has decreed.

Petitioner contends that by not restricting respondents' claim to Section 9, it has been "stripped" of what it views as its inalienable protection and defense under that statute. For one, petitioner contends that the 1-3 year limitations provisions of Section 9(e) would result in its dismissal from the action. That is an erroneous assumption as petitioner ignores the application of limitations statutes to conspiracy situations. Here, the conspiracy has been established as active well into 1966 and alleged into 1967, all well within a three-year period of the bringing of this action against petitioner.

Neither would other provisions of Section 9(e) confer a special benefit on petitioner. The cost bond is probably trivial in the context of this litigation. The so-called specific rule of damages seems to provide an element that plaintiffs are presently seeking in the lower court; and provision for recovery for attorneys' fees as an element of damages against liable defendants is one respondents welcome and presently seek as an additional

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element of damages in the district court. In short, petitioners' contention that the failure to restrict respondents' claim to Section 9 deprives him of rights and protections is illusory.

The granting of the writ on the first question would merely lead this court into a debate on an issue of whether and how to restrict fraud claims under the 1934 act with the attendant danger of restricting and diluting well-established principles. Those principles need no further affirmance from this court as shown by their universal acceptance in the circuits. There is no reason for certiorari and therefore the writ ought to be denied.

II.

THE OPINION OF THE SEVENTH CIRCUIT ON PLAINTIFFS' IMPLIED RIGHT OF ACTION UNDER SECTION 17 OF THE 1933 ACT WHILE CORRECT IN ITS FACE WAS NOT A DECISION OF THAT COURT SUBJECT TO REVIEW BUT RATHER GOOD, SOUND DICTUM.

The essence of the Seventh Circuit opinion on the question of implied right of action under Section 17 of the 1933 act was that it did not have to decide this question in light of its affirmance of respondents' 10(b) claim. (Pet. App. pp A-26, A-27). Hence, there was no decision on the validity of a Section 17 claim standing alone and language approving the claim in conjunction with Section 10(b) of the 1934 act represents sound dictum.

We say sound because the language is another example of the adherence by the Seventh Circuit to this court's posture of flexibility and non-restrictiveness in the approach to civil remedies for fraud under the securities acts as a whole.

Nevertheless, as there was no decision in the circuit court of appeals, there is nothing for the Supreme Court to review. Certiorari ought to be denied.

III.

THE PRINCIPAL BASIS OF THE CLAIM AGAINST PETITIONER IS FRAUD THOUGH THE CONDUCT OF ITS EMPLOYE MANIPULATOR, HARRIS NAGORSKY, ALTHOUGH NEGLIGENCE IS ALSO A FACTOR. THERE IS NO CONFLICT AMONG THE CIRCUITS OR DISPUTE FROM THE DECISIONS OF THIS COURT THAT FRAUD FORMS THE BASIS OF A 10(b) ACTION AND APPLICATION OF FEDERAL EQUITABLE TOLLING OF LIMITATIONS UNTIL THE TIME OF DISCOVERY.

In Question No. 3 and in Part III, petitioner Rodman mischaracterizes respondents' claim as based upon pure negligence or, in terms of the Seventh Circuit, "negligently facilitating fraud."

True, the element of negligence is present, particularly in respondents' claim that petitioner failed to properly supervise the conduct of its manipulating customer's representative, Harris Nagorsky.

The principal basis, however, of the claim against Rodman is fraud and liability is predicated upon common law respondeat superior and the statutory controlling persons doctrine under Section 20 of the 1934 act (15 U.S.C. §78t). In addition, respondents intend to prove that the principals of Rodman were aware of the Hercules Galion stock manipulation while it was in progress and did nothing at their firm to stop it.

The Seventh Circuit properly characterized the case against Rodman in the following from its opinion: (Pet. App. p. A-32)

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> Clearly the action of Rodman & Renshaw fell within the ambit of equitable tolling. In their original claim for relief the plaintiffs alleged direct participation in the conspiracy to manipulate the price of Hercules stock as well as negligent facilitation. Even as equitable tolling works to prevent the defrauder from taking advantage of his wrongdoing, it also works to prevent the negligent person from taking advantage of his carelessness.

Petitioner's misapprehending approach in Part III of its brief is an attempt to bring it within the April 14, 1975 grant of certiorari in the case of *Hochfelder* v. *Ernst & Ernst*, 503 F.2d 1100 (7th Cir. 1974). There the principal and apparently the only basis of the 10(b) claim against the independent auditor was negligence in failing to properly audit the brokerage firm, First Securities Company, so as to discover the fraud of that firm and its principal. This court granted certiorari on the question of whether such a claim limited to negligence is actionable under 10(b) together with applications of the statute of limitations.

Here there is no dispute, as petitioner apparently concedes, that in a claim based on fraud, the statute of limitations is tolled until the fraud either was or should have been discovered. *Bailey* v. *Glover*, 88 U.S. 342, 22 L.Ed. 636, 638 (1875). Neither do we know of any conflict in the circuits on this point and petitioner has not cited any. Furthermore, there is no dispute in the immediate cause that respondents did not nor could have discovered their claim based on fraudulent manipulation of Hercules Galion stock until the return of the federal criminal indictment in August 1967, 18 months prior to suit against this petitioner.

There being no conflict to resolve or any of the other elements of Rule 19(b) present, there are no grounds for granting the writ and certiorari ought to be denied.

IV.

NO CONFLICT EXISTS AMONG THE CIRCUITS ON THE PRINCIPLE OF FEDERAL COURT BORROWING OF THE LOCAL STATE STATUTE OF LIMITATIONS IN ACTIONS BASED ON SECTION 10(b) AND OTHER REMEDIAL PROVISIONS OF THE SECURITIES ACTS THAT CONTAIN NO SPECIFIC LIMITATION PERIOD. WHILE THIS SYSTEM WORKS WELL, IF UNIFORMITY IS DESIRABLE IT IS BEST ACHIEVED BY LEGISLATIVE RATHER THAN JUDICIAL FUNCTION.

Petitioners' last ground for certiorari is a request that this court review the well-established practice and law among the circuits of adopting state statutes of limitations in 10(b) actions. This is apparently an appeal to this court's powers of supervision with the implied suggestion that the law among the circuits is in hopeless confusion on the point.

To the contrary, we know of no conflicting decisions among the circuits on the principle of borrowing the forum state statute of limitations in the absence of a specific federal statute and petitioner has cited none. There is simply no need for this court's supervision in the area. That petitioners have themselves been sued well within the applicable Illinois limitation period does not provide any such need.

If uniformity across the land is desirable on the limitations period and remedial provisions of the securities acts including Section 10(b) of the 1934 act, we suggest that the matter be properly and much more simply handled

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by act of Congress. That Congress, however, has not chosen to amend the law in this respect in the 40 some years since the passage of the securities acts of 1933 and 1934 would indicate reasonable satisfaction with the workings of the system and that there is no problem. In the absence of any need or legal justification and this court's exercise of its supervisory power, we again suggest that certiorari be denied.

CONCLUSION

For all the foregoing reasons, respondents request that the petition of Rodman & Renshaw for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1407

RODMAN & RENSHAW,
Petitioner,

vs.

ROBERT AND SANDRA SCHAEFER, ET AL.,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The merit of Rodman & Renshaw's position in its Petition for this Court's writ of certiorari is magnified by the Respondents' opposition thereto. Respondents do not attempt to discuss or distinguish any of the cases cited by Petitioner and relied upon by Petitioner to show the inconsistencies and conflicts of the Seventh Circuit opinion with governing authority. Instead Respondents seek to convince this Court that the issues are not as portrayed by Petitioner and hence should not be reviewed. Respondents are egregiously in error.

I.

Respondents first seek to dodge the issue, as to whether the specific limitations of Section 9(e) of the Securities Exchange

Act of 1934 may be evaded by permitting an action to be maintained under Rule 10(b)(5), by asserting that their claim would not be barred by 9(e)'s limitations (Brief pp. 2, 8).

Respondents are not candid in this position. In their brief in the Court of Appeals, they conceded that they had waited more than a year, after learning in August of 1967 of the conspiracy, to file their action. The action was filed in February, 1969, approximately eighteen months *after* Respondents acquired this knowledge, well beyond the one year period permitted by Section 9(e). The Court of Appeals also "found" (Pet. App. p. A-35) "The plaintiffs discovered the existence of the fraud in August, 1967."

In addition, Nagorsky's employment with Rodman had been terminated, ending Rodman's liability for his allegedly fraudulent conduct, in October of 1965, more than three years prior to the filing of the action.

On these facts, the action for market manipulation on a national exchange under Section 9(a)(2) would be time barred under Section 9(e). The only reason for resorting to the Rule 10(b)(5) claim is to avoid that bar.

II.

Respondents urge (Brief, p. 9) that the Court of Appeals did not decide whether or not a right of action may be implied under Section 17 of the Securities Act of 1933. The language of the opinion permitting Petitioners to maintain the action is described as "sound dictum."

The effect of the Court of Appeals decision was and is to permit Petitioners to maintain the present action under Section 17. The refusal of the Court of Appeals to rule has the effect of a refusal to grant Rodman's motion to strike this claim. This refusal is hardly dictum. Negatively, the Court has ruled. It has ruled in a manner inconsistent with the precedent cited, precedent to which Respondents have not seen fit to respond.

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III.

Respondents urge (Brief, pp. 6-8) that this Court's holdings in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) and *Superintendant of Insurance* v. *Bankers Life and Casualty Company*, 404 U. S. 6 (1971), permitting an expansive construction of the Securities Acts, somehow justify the failure of the Court of Appeals in the present case to construe the 1934 Act at all.

The Court of Appeals, in reference to the Securities Act aspects of the use, simply ignored the rules of construction urged by Rodman there and in the present petition for certiorari. Anomalously, the Court applied these rules in determining that Respondents' claim could not be asserted under the Sherman Act. These rules emphasize that a particular remedy governs over a remedy granted by general language in the same or another statute. Respondents ignore these basic canons in their present brief, canons bearing this Court's imprimatur as well as those of various circuit courts, and yet Respondents solemnly assure this Court that the Court of Appeals' decision does not conflict with any decisions of this Court or any Court of Appeals.

The rule of "liberal" construction is simply not a license to avoid construction. The remedial purpose of Congress, invoked as the touchstone for the "flexibility" urged, is not served by ignoring Congressional intent expressly manifested in the limitations periods and other incidents of the Section 9 remedy.

IV.

The argument of Respondents on pages 10-12 of their Brief quarrels with Rodman's position that the issue of tolling in the present case is the same as that involved in *Hochfelder* v. *Ernst & Ernst*, 503 F. 2d 1100 (7th Cir. 1974) upon which this Court has granted certiorari on April 14, 1975, docketed here as No. 74-1042.

Here the Court of Appeals did, as Rodman stated in its Petition, permit the statute to be tolled as to it as one who "negligently facilitate(d) the fraud" (Pet. App. pp. A31, 32). The Court did also state, as Respondents now point out, that there was language in "their original claim for relief" alleging "direct participation in the conspiracy to manipulate the price of Hercules stock as well as negligent facilitation" (Pet. App. p. A32). This charge of direct participation was not repeated in the amended claim which was before the District Court at the time of Rodman's dismissal and so was not properly before the Court of Appeals. In deference to the Court of Appeals, it does not appear that its decision was based upon any charge of direct participation in the fraud, but was explicitly and repeatedly related to the charge of negligence which facilitated the fraud.

Respondents, either inadvertently or deliberately, refuse to recognize that the tolling issue is as stated by Petitioner. Their purblindness as to this issue precludes their appreciation that conflict does exist in the current holdings of the Seventh Circuit on this point and the judicial refusals to toll limitations as to those only charged vicariously with fraud relied upon in the Petition. For purposes of Rule 19, a conflict may exist either as to cases of ancient or recent vintage. Here the conflict exists as to both.

Finally, Respondents claim (Brief, p. 11) that Rodman concedes that the statute of limitations is tolled generally, as to claims based on fraud, until the fraud is or should be discovered. Petitioner not only disclaims such a concession, but can only marvel at the disingenuousness with which Respondents assert it as Petitioner's position. The whole thrust of Petitioner's argument with reference to *Bailey* v. *Glover*, 88 U. S. 342 (1875), its forebears and its progeny, is that its tolling doctrine applies *only* to those committing the fraud.

For the foregoing reasons and for the reasons stated in the Petition filed herein, this Court's writ should issue to the

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Seventh Circuit Court of Appeals and its decision reviewed and rectified.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1974

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RODMAN & RENSHAW,

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ROBERT AND SANDRA SCHAEFER, ET AL.,

Respondents.

PETITIONER'S REPLY TO MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION.

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Respondents.

PETITIONER'S REPLY TO MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION.

The Memorandum filed on behalf of the Securities and Exchange Commission, self described as Amicus Curiae, does not measure up to its label. To paraphrase Chief Judge John R. Brown's story,[1] the Commission is no more a friend of this court than Rodman. In fact, if fidelity to legal reality is a touchstone of such friendship, the Commission is less a friend than many an avowed partisan, including Petitioner. The Commission's Memorandum is noteworthy for its failure to respond to Petitioner's authority and for its misleading citation and quotation from what it presents as authority adverse to Petitioner's position.

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1. Recounted in his address to the Labor Law Section, *American Bar Association,* Labor Law Section Report, 1969, pages 175, 176. He asked a lawyer during argument before the Fifth Circuit Court of Appeals what he had to say about a brief of amicus. The lawyer responded, "Judge Brown, I want to tell you one thing. That man is no more a friend of this Court than I am."

1.

A.

The Commission asserts (page 3), "It is well established, however, that the availability of a particular remedy under one provision of the federal securities law does not preclude the availability of another remedy under another provision." In support of this generalization, the Commission cited *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U. S. 453. Not only is the asserted principle not established but it is most certainly not established by the case cited. There is, as urged in Rodman's Petition, *no* case extant, permitting avoidance of the safeguards of an express remedy, such as that provided by § 9 of the Exchange Act (15 U. S. C. 78(i)), by resort to a remedy under a generalized proscription. *A fortiori*, the express remedy's limitations should be adhered to where the remedy under that generalized proscription is the product of judicial implication.

The *National Securities* case did *not*, as asserted by the Commission, permit a remedy under Rule 10(b)(5) for representations "proscribed under § 14 of the Act (15 U. S. C. 78n) and Commission Rules." For, "At the time of the conduct charged in the complaint, these provisions did not apply to respondents." 393 U. S. 468.[2]

The argument to which the Court was responding when it made its reference to "overlap", as reflected in the lower court opinions, 387 F. 2d 25 (9th Cir. 1967) and 252 F. Supp. 623 (D. Ariz. 1966) was that Rule 10(b)(5) should not apply where § 14 and the Commission's rules governing proxy solicitation would not. The case does not relate to any problem of selection, duplication, or "overlap" of remedies.

---

2. The selection of a case not involving civil damage remedies and, indeed, not involving multiple remedies of any type as authority for the proposition advanced is singularly maladroit.

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This Court noted, 393 U. S. 468, "The two sections of the Act apply to different sets of situations. Section 10(b) applies to all proscribed conduct in connection with the purchase or sale of any security; § 14 applies to all proxy solicitations, whether or not in connection with a purchase or sale."

§ 9(a)(2) does not cover *all* manipulative conduct, and, as stated by the Commission (Memo. p. 4), if § 10(b) and its Rule are inapplicable to conduct for which a remedy is provided by § 9, the right of action thereunder is different. From this ponderous logic it does not follow that "[T]here is nothing to suggest that Congress intended this anomalous result, which would be likely to impair the orderly application of the federal securities laws." In fact the language of *National Securities* applies: "The two sections of the Act apply to different sets of situations." And, to paraphrase that holding, § 9(a)(2) applies to manipulations on a national exchange and § 10(b) applies to all *other* manipulations.[3]

The illogical conclusion of the Commission ignores the anomaly of ascribing to Congress an intention, expressed in the enactment of § 10(b), to eliminate the benefits and burdens, including the limitations period, of the express right of action of § 9. If the Commissions' exegesis is based upon a surmise as to Congressional intent, its conclusion only frustrates that intent as manifested by Congress' provision for a particular remedy under § 9. How recognition of the Congressional intent

3. The "overlap", if any, existing with reference to § 9 and § 10 of the 1934 Act is at variance with the Commission's and the Act's design; as noted by Mr. Loss, quoted here in Petition footnote, pps. 10-11. § 10(b) was to reach all "*other* cunning devices * * *" than those already proscribed (Italics supplied). This "overlap" was not apparent to the government in the criminal prosecution brought as an aftermath of the manipulation. As noted by the Commission (Memo, p. 1), the manipulators were charged with and convicted of violations of § 17 of the Securities Act of 1933; § 9(a)(2) of the Securities Exchange Act of 1934; and federal mail and wire fraud statutes, 18 U. S. C. 1341, 1343. The omission of 10(b) charges there in the context of a shotgun approach challenges the verisimilitude of the Commission's present stance.

so manifested impairs the orderly application of the federal securities laws is not explicated by the Commission.

B.

The Commission is correct (Memo. pp. 4 and 5) when it states that the Courts of Appeals have uniformly held that local statutes of limitations apply to actions brought under § 10(b) and Rule 10(b)(5). The Commission is apparently unperturbed by the lack of an "orderly application of the federal securities laws" resulting therefrom. As noted in the Petition, not only has this resulted in the almost accidental application of limitations of a forum of plaintiffs' choice but has also caused needless litigation as to which statute of the forum state to apply.

Further, the federal policy of adopting "the local law of limitations" noted in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395, relied upon by the Commission, has never to the best of counsels' knowledge been applied by this Court where a federal policy of limitations has been as near at hand as in the specific limitations periods of the Securities Acts. When Congress has explicitly enunciated its own policy of limitations, as it has done in the Securities' Acts, that enunciation should convey a plainer message than that presumed from Congressional silence.

The failure of Congress to provide a limitations statute for actions grounded on Rule 10(b)5 "even after widespread judicial recognition of an implied right of action under that section" is footnoted by the Commission (Memo, p. 4) to Congressional action in 1938, amending § 29(b) to provide for limitations for other proscribed conduct. If the intended inference is that Congress so acted, *after* "widespread judicial recognition" of a 10(b)5 action, and omitted to act with reference to 10(b)5, it must be noted that it was not until 1946 in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 519 (E. D. Penn.) that any such private right of action was discerned by any court. If that is not the intended inference, the footnote has no relevant message.

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Finally (Memo, p. 5), the Commission professes to perceive a third possibility. This alternative, the Commission says, is that, even if the manipulation here was governed by § 9(e)'s limitations (whether brought pursuant to § 9 or Rule 10(b)(5)), that limitations period should not apply to an action "based upon a broker-dealer's alleged failure to adequately supervise the conduct of its employee." If the Commission is suggesting that still another statute of limitations might apply,[4] its position is untenable. § 20 of the 1934 Act (15 U. S. C. 78t) provides for vicarious liability "unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or causes of action."

Presumably, Rodman's liability for inadequate supervision would arise under this section, but, most assuredly the timeliness of suit against it, if otherwise governed by § 9, would also be governed by § 9's limitations. The failure of the Commission to see the question here presented "in clear form" (Memo. pp. 5, 7), is due solely to its own ability to muddy the forensic waters.

2.

The Commission asserts that the Court of Appeals did not resolve the issue as to whether a private right of action may be implied under § 17(a) of the Securities Act. The Court's action, permitting the claim to stand, is an endorsement of such an action, even if a left handed endorsement.

Judicial inertia is thus encouraged at the expense of needless proliferation. The inertia is justified on the basis that it makes little difference if a 10(b)(5) claim is permitted to stand. It does make a difference here where the 10(b)(5) claim is patently nonexistent.

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4. The case should then be sent back to determine the statute applicable to negligence actions; the borrowed statute problem has been uniformly cast in terms of choice of the general common law fraud limitations statute *vis a vis* Blue Sky Laws limitations; cf. *Charney* v. *Thomas*, 372 F. 2d 97 (C. A. 6) and *Vanderboom* v. *Sexton*, 422 F. 2d 1233 (C. A. 8), *cert. denied*, 400 U. S. 852.

3.

Finally, the Commission suggests that the Court may wish "to hold this petition" pending its disposition of the question as to whether limitations begin to run from the time of discovery or cessation of the fraudulent acts. This is the question that the Commission deems to be posed by *Ernst & Ernst* v. *Hochfelder*, No. 77-1042. This is an inapt description of the question posed by *Ernst & Ernst* which, in full, is as follows:

> "2. Whether the statute of limitations applicable to Respondents' cause of action against Petitioner may be tolled by Petitioner's alleged 'negligent facilitation and implementation of fraud' in the absence of any allegation of deliberate or intentional fraud or reckless or willful conduct or of knowledge of such fraud or conduct on the part of Petitioner?"

Rodman's question presented is as follows:

> "Whether, if the limitations period of the forum state is to be applied, the period should be tolled as to defendant whose liability is derivative and vicarious and is not predicated upon complicity in the fraudulent scheme but upon negligence facilitating the fraud?"

In support of this question, Rodman has presented argument and authority not mentioned in the *Ernst* petition and certainly relevant to decision of this basic point. To insure a forum for this argument, Rodman's petition should be granted, not held in abeyance. Further, the question as presented in *Ernst* and here is not as simple as the Commission would have it. The question is rather as to whom does the statute run and as to whom is it tolled. Petitioner's authority is that the statute (when the statute is borrowed) runs as to a defendant vicariously liable but not as to the active offender. This position has not been fully presented in the *Ernst* case.

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4.

The Commission casually (Memo. p. 5) references, as reinforcing its argument, the case of *Blue Chip Stamps* v. *Manor Drug Stores*, 44 L. Ed. 2d 539, decided June 9, 1975, since the filing of Rodman's Petition herein.

It is submitted that the decision neither supports nor reinforces any position expressed by the Commission here. The decision expressly buttresses Petitioner's position.

The Court there, 44 L. Ed. 2d 549, 550, reviewed the "principal express nonderivative private civil remedies" under the 1933 and 1934 Securities Acts, emphasizing their applicability to purchasers and sellers concluding:

> "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action."

Here the anomaly is to expand the limitations period for a judicially implied cause of action beyond the bounds it (Congress) delineated for the *same*, not a comparable, express cause of action.

And, at 44 L. Ed. 2d 552, the Court referred to the burdens placed on explicit rights of action as a factor limiting suit "in an action wholly implied from the language of the 1934 Act." Cf. § 9(e)'s provisions permitting the court to require an undertaking for costs and for attorneys' fees of either litigant, establishing rights of contribution and limiting the time within which suit could be brought.

The concurring opinion, 44 L. Ed. 561 emphasized, as does Petitioner here, the language of the statute and the fidelity of its legislative history to the result. Those same considerations support Petitioner in the present case. That same history was elaborated by the dissent, 44 L. Ed. 2d 556, 567, and a conclusion contrary to the majority was there reached, but not in respects contrary to Petitioner here.

CONCLUSION.

It is understandable that the Commission's underlying bias as an enforcement agency would be against the enforcement of statutory limitations.[5] Yet those limitations periods are as significant in terms of Congressional policy as its commandments of fair dealing and full disclosure enforced by the Commission.

The policy reflected in enactment of limitations periods is much the same as that served by the Securities Acts. The potential for abuse involved in suits, such as the present one, where the events relating to Petitioner occurred in 1965 is eliminated by enforcement of that policy.

The Petition for certiorari should be granted.

Respectfully submitted,

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5. The Commission's willingness to expand § 10(b)5 at the expense of its "precise language" provoked this Court's description of the SEC's position as "curious" and "surprising(ly)" in *Blue Chip Stamps* v. *Manor Drug Stores,* 44 L. Ed. 2d at 563.

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